

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 July 2005

CASE NOS.: 2003-LHC-00906
2003-LHC-00907

OWCP NOS.: 14-133079
14-138283

In the Matter of:

RAYMOND SEARS,
Claimant,

vs.

NORQUEST SEAFOODS, INC.,
Employer,

and

WASAU INSURANCE COMPANIES,
Carrier.

Appearances:

Dietrich Biemiller, Esq.,
D. Michael Tomkins, Esq.,
For the Claimant

Philip W. Sanford, Esq.,
For the Employer/Administrator

BEFORE: *GERALD M. ETCHINGHAM*
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act") as amended. Claimant Raymond Sears ("Claimant") seeks compensation and medical benefits for an alleged injury to his respiratory system and the subsequent psychological impairment related thereto and sustained in the course and scope of his employment as a ship laborer with Norquest Seafoods, Inc. ("Employer") aboard the fish-processing vessel called *M/V Pribiloff*.

Claimant's Exhibits ("CX") 1 through 8 and CX 10 through 12 and CX 14, and Employer's Exhibits ("EX") 1 through 13 were admitted into evidence at the formal hearing held on September 16, 2004 in Seattle, Washington.¹ TR at 6-27, 31-32, 307-308. EX 14 is the second deposition of Mike Deaver and was admitted at hearing prior to it having been taken. TR at 308. EX 15 consists of one dvd and videotape of Mike Deaver's second deposition testimony on October 27, 2004. Claimant and Employer's pre-hearing statements, witness and exhibit lists including supplements thereto, as well as the notice of calendar call and pre-trial order in this matter, were also admitted at the hearing and identified as Administrative Law Exhibits ("ALJX") 1 through 8. TR at 33. CX 9 was withdrawn by Claimant's counsel prior to hearing and CX 13 was not admitted into evidence having been denied for reasons referenced in the record. TR at 26, 307. Numerous pages on Claimant's exhibit CX 1 are illegible, duplicative, unmarked, and will not be considered in this Decision. The disorganized manner of Claimant's submitted exhibits has delayed issuance of this decision.

All parties were represented by counsel, and at the close of the hearing the record was left open for the submission of post-trial briefs, which were filed both by Claimant and Employer and became part of the record on November 16, 2004 as ALJX 9 and ALJX 10, respectively.

STIPULATIONS

At the hearing, the parties stipulated to the following:

1. The Act is applicable to Claimant's claim;
2. An employer/employee relationship between Claimant and Employer existed at the time of the alleged injury on February 16, 2000;
3. Claimant's alleged injury, if any, arose out of and in the scope of his employment with Employer;
4. Claimant timely filed and timely noticed the claim;
5. Claimant's compensation rate at the time of injury was at the statutory minimum rate of \$225.32 per week and not less than fifty percent of the national average weekly wage at the time; and
6. Employer has not paid Claimant any compensation or medical benefits.
7. Claimant reached maximum medical improvement for his physical pulmonary condition in April 2001.
8. Employer has not waived any of its prior arguments made in its denied motion for summary decision regarding alleged claim preclusion from Claimant's earlier section 908(i) settlement with Labor Ready.
9. Employer is entitled to credit for the \$10,000 paid to Claimant by Labor Ready in settlement of its case.

TR at 34; ALJX 9 at 2-3; ALJX 10 at 1-2; EX 4 at 4.51-4.63. Because there is substantial evidence in the record to support the foregoing stipulations, I accept them.

¹ References to the hearing transcript are indicated by "TR;" Claimant's and Employer's Exhibits are referred to as "CX" and "EX," respectively.

ISSUES FOR RESOLUTION

The unresolved issues in this matter are:

1. Whether there is any causal relationship between Claimant's respiratory and psychological conditions and his employment with Employer;
2. Nature and extent of disability;
3. Date of maximum medical improvement ("MMI"), if any, for Claimant's psychological condition, if work-related; and
4. Entitlement to medical expenses under Section 7 of the Act.

SUMMARY

This case involves Claimant who came to Employer with a pre-existing personality disorder and an extensive criminal record that severely limited his gainful employment to situations where Claimant could work isolated and to himself and did not have to deal with people. Stated differently, Claimant was the proverbial "eggshell" plaintiff coming to work with Employer with psychiatric condition and criminal record that limited his employability. With this background, I find that the February 16, 2000 incident exposing Claimant in confined quarters to a toxic gas likely involving chlorine caused him temporary work-related respiratory and related temporary psychological problems which both stabilized in April 2001. Claimant's respiratory problems became permanent while his work-related psychological problem has resolved. As a result of Claimant's limited gainful employment opportunities *before* the February 16, 2000 incident combined with his ongoing physical restrictions, I agree with treating physician Dr. Brodtkin that none of the employment positions offered by Employer are suitable for Claimant and he remains permanently and totally disabled and entitled to compensation benefits at the minimum rate as well as limited medical benefits paid by Employer after applying the \$10,000 credit for Claimant's earlier settlement with Labor Ready.

FINDINGS OF FACT

Claimant was born September 19, 1947 in an orphanage and came from a dysfunctional family life as to his parents. EX 3 at 3.43. Claimant was raised by his grandparents and attended parochial school. *Id.* Claimant's grandfather and family were involved in antisocial and criminal behaviors. EX 3 at 3.49.

Claimant served in the U.S. Coast Guard from 1964 to 1970. Claimant attended Maritime Sciences U.S. Academy in New York from 1970 to 1974. Claimant stole cars in the 1970's and one time was arrested and served one year in Danbury, Connecticut prison. Since then, Claimant has been arrested for various DUIs and other things such as fighting. In 1994 or 1995, Claimant was arrested for having a loaded and concealed gun without a permit and served 16 days of a 30 day sentence. EX 3 at 3.49.

Claimant worked as a merchant marine sailor for approximately 20 years from 1974 until approximately 1993 when he retired. CX 1 at 31; EX 3 at 3.42 and 3.44. Claimant would ship out

of Boston and be out to sea for six or seven months a year when he worked as a seaman. EX 3 at 3.44.

Claimant married in 1966 and the couple had three children. They divorced in 1988 or 1989. EX 3 at 3.44. Claimant remarried in 1992. EX 2 at 2.25.

Claimant had a severe and almost fatal illness sometime between 1994 and 1996. EX 2 at 2.22; EX 3 at 3.42. Claimant attempted to remove several of his own teeth after he got drunk. EX 2 at 2.22. Claimant had an infection in one of his teeth which got worse and almost killed him. Ex 3 at 3.42. He was hospitalized for 13 days and they had to cut his throat to keep him breathing. *Id.* Claimant's teeth were removed and he had jaw surgery and missed weeks of work. *Id.*

From 1993 to 1999, Claimant lived a somewhat nomadic existence. He usually lived in a travel trailer. From 1995 until he came to Seattle in September 1999, Claimant lived and worked temporarily in Denver, then Omaha, then Counsel Bluffs, Iowa, and then Denver again and then Salt Lake City. EX 3 at 3.44. Claimant did freight handling, and sometimes made \$200 or \$300 a day when he worked. *Id.* Claimant testified that he had been doing heavy labor all of his working life and that he had been smoking while doing this type of work. TR at 163.

Claimant came to Seattle in September 1999 and took a job in October through Labor Ready where he worked as a temporary worker, chipping paint aboard a seafood processing ship. EX 2 at 2.22. Without a union book and membership, Claimant was unable to work as a seaman, and by his own admissions, had no intention of doing so prior to the February 16, 2000 incident. EX 3 at 3.49. Instead, he did general manual labor working as a shipboard laborer from 1999 through the date of the February 16, 2000 work-related incident involved in this case. CX 1 at 31; EX 3 at 3.44. Claimant did not recall any asbestos exposure during his working career. *Id.*

On February 14, 2000, Claimant was subcontracted out to work for Employer. His job was to clean a 6500 to 8000 gallon water tank aboard the motor vessel *Pribiloff*, which was a 210-foot vessel in the water at Ballard, Washington. CX 1 at 29; CX 10 at 678.

Claimant began work on the *Pribiloff* on February 14, 2000 and testified that his job was to clean out the water tank which he did by mixing a chlorine and water solution, approximately 1-1/2 quarts chlorine to five gallons water, and then from inside the tank, he would scrub down the sides' top and bottom with a brush. He stated that there were two people on the job; however, he worked alone inside the tank, and the other person worked outside the tank. TR at 193; CX 1 at 29; CX 10 at 678; EX 2 at 2.23.

On February 14 and 15, 2000, Claimant felt a burning in his eyes after working several hours within the tank, and he would occasionally take an air break outside the tank until he felt better. Claimant estimated that he worked approximately seven or eight hours inside the tank each day for the first two days of the job. CX 1 at 29-30.

Claimant wore no respiratory protection while working this job and he described a minimal ventilation system consisting of outside fans which occasionally worked. The top of the

tank was described by Claimant as having a 2 foot by 2 foot hatch at the top which would remain open with no cross-ventilation. *Id.* On February 16, 2000, Claimant observed that there was no fan to ventilate the tank. EX 2 at 2.23.

Claimant complained to Michael Deaver, his supervisor, about the fumes from the chlorine bleach solution and of inadequate ventilation in the tank. TR at 188-193; CX 1 at 280; EX 1 at 1.4. The inadequate ventilation was the result of a repeated shutdowns of the fan that was being used to vent the fumes from inside the tank to the hatch opening at the top of the tank. *Id.* The fan was shutdown at least three different times on February 15, 2000 by welders on the deck above the tank because they objected to the fumes coming from the tank. *Id.*

On February 16, 2000, the ventilating fans were removed yet Claimant continued to complete his cleaning work in the tank since he was close to finishing. CX 1 at 280. After working several hours within the tank, the vessel shifted, thereby causing waste water and other fluids within the vessel to shift and combine inside the tank where he was working. TR at 186, 194; CX 1 at 29-30, 35; EX 2 at 2.23. A bilge-type solution, containing chlorine and other unknown waste materials, came inside the tank, creating a cloud-like accumulation that appeared as a fog inside the tank. TR at 190, 194, 271. Anywhere from about 50 to 60 to 200 gallons of this bilge water came into the tank and Claimant immediately became aware of a stronger chlorine taste in his mouth. TR at 160, 186, 190, 194; CX 1 at 30 and 280; EX 1 at 1.4; EX 2 at 2.23. At this time, the ventilation fans were removed when Claimant was almost finished with his job on February 16, 2000 and the removal of the fans combined with the chlorine fumes that were present led to his becoming disoriented and overcome by the fumes. CX 1 at 280. Claimant also experienced burning eyes, skin, nose, and throat, a strong smell of chlorine, and began to feel light-headed. TR at 160, 186, 194; CX 1 at 30; EX 1 at 1.4; EX 2 at 2.23.

Claimant next tried to get out of the tank but needed to step over several baffles before he made his way to the hatch. He estimated that he was in the tank between five to ten minutes after the vessel shifted and added bilge water. A co-worker entered the tank to assist Claimant outside where he was laid down on his back feeling quite light-headed, and having developed a headache. The bad taste in Claimant's mouth continued, and his eyes and skin continued to burn and he began to feel shortness of breath. CX 1 at 30; EX 1 at 1.4; EX 2 at 2.23.

Chief Engineer and Claimant's supervisor, Mr. Deaver, first testified at his deposition on April 18, 2002 in the district court negligence case about the conditions on the *Pribiloff* on February 16, 2000. CX 10 at 624 and 640; EX 14 at 14.316 and 14.318. Mr. Deaver confirmed that he had found bleach in the same water tank cleaned by Claimant and that when bleach was in the tank he could very much smell it and that he also had a hard time getting out of the tank because of the fumes. CX 10 at 648. Mr. Deaver also confirmed that bleach was available to use on the vessel although he claims that he instructed Claimant not to use the bleach for cleaning the tank. CX 10 at 649. Later Mr. Deaver testified that Chlorox bleach is used to chlorinate the water that is pumped into the same 6000 to 8000 gallon tank over a day's time to also clean the tank. CX 10 at 677-78. He later testified that Claimant told him that he had cleaned many a tank before so Mr. Deaver felt he did not actually need to tell Claimant how to do his job cleaning the water tank. CX 10 at 653.

Mr. Deaver also testified that there should have been a 12-inch fan feeding oxygen into the tank. CX 10 at 652; EX 14 at 14.330. He stated that the only instruction he gave Claimant before he started the tank cleaning job was to “make sure that your fresh air is always supplied after you get in [to the tank] and take your rags with you.” CX 10 at 669. Mr. Deaver also testified that the ship was probably listed or leaned over to one side with a crane on Claimant’s request to help collect the silty water in the tank that needed to be pumped out. CX 10 at 672-73; EX 14 at 14.324-25, 14.349.

On February 16, 2000, Mr. Deaver arrived at the accident scene shortly after Claimant was just coming out of the tank. CX 10 at 659; EX 14 at 14.334-35. Mr. Deaver described Claimant as looking weak and he said he knew Claimant was not faking it. CX 10 at 660. Almost immediately after Claimant got out of the tank, Mr. Deaver knew that Claimant had been using bleach in the tank. CX 10 at 662.

Mr. Deaver further testified that it took from thirty to forty-five minutes for the paramedics to steady Claimant and take him to the emergency room on February 16, 2000. CX 10 at 662. Mr. Deaver went into the tank approximately forty-five minutes after Claimant came out of the tank. CX 10 at 670. Mr. Deaver further testified that after Claimant left with the paramedic, Mr. Deaver went into the tank, and saw that a little bit of bilge water had gotten into the tank. Mr. Deaver stayed only 25 to 30 seconds in the tank before he retrieved a bucket left by Claimant because he could not have lasted any longer in there as “[i]t was heavy with chlorine smell.” CX 10 at 670-71, 674-75. Mr. Deaver further described the condition forty-five minutes after Claimant came out of the tank as causing him to feel nauseated as he was trying to find the source of Claimant’s problem. CX 10 at 674 and 684. Mr. Deaver concluded this line of testimony by stating that it was still so bad after forty-five minutes and going all the way down in the tank that it hurt his lungs to breathe in the tank and that while briefly in the tank, he felt the chlorine in his nose. CX 10 at 675 and 683.

Mr. Deaver testified that he believed that Claimant was working in this same chlorine bleach environment in the tank on February 16, 2000 but possibly with air being supplied and that Claimant was forcing himself to stay in the tank to do his job. CX 10 at 684. Mr. Deaver further testified that he did not know whether the fresh air to the tank and fan were removed while Claimant was in the tank on February 16, 2000. CX 10 at 686.

Within 20 to 30 minutes after the Claimant’s exposure, emergency medical personnel arrived and administered oxygen to Claimant. He was taken to the hospital emergency room at Ballard Swedish Hospital where more oxygen was administered for approximately three hours. CX 1 at 30; EX 1 at 1.4; EX 2 at 2.23. At that time, Claimant had chest tightness and could taste or smell some bleach. EX 3 at 3.45.

Claimant was examined by Dr. Robert M. Wexler at Swedish Medical center. EX 13 at 13.307-08. Claimant was put on oxygen and examined. Dr. Wexler diagnosed Claimant with Clorox bleach exposure, mild in nature, and opined that Claimant would “probably do fine.” EX 13 at 13.308. Dr. Wexler ordered Claimant to re-check with his personal physician for follow-up. *Id.* After leaving the emergency room, Claimant contacted Labor Ready and completed a report.

EX 2 at 2.23. Claimant then decided to stop at the local bar and had a couple of shots. TR at 277; EX 2 at 2.23.

The next day, on February 17, 2000, on referral from Labor Ready, Claimant went to Healthsouth complaining of continuing symptoms where the examining doctor told him that there was nothing wrong with him. EX 2 at 2.23-24. EX 3 at 3.45; EX 13 at 13.308. Claimant characterized the doctor as “one of those doctors who says you’re never hurt.” EX 2 at 2.23. The attending physician diagnosed Claimant with chlorine gas inhalation and found Claimant’s chest clear and Claimant saying that he was “ok” and refused further objective tests. EX 13 at 13.309.

On February 21, 2000, Claimant visited the University of Washington Medical Centers at Harborview again complaining of hurting lungs and being able to taste bleach. CX 1 at 132, 280.

On February 24, 2000, Claimant went to the emergency room at Harborview reporting shortness of breath, feeling worse, having a strong taste of chlorine in his mouth, having a new cough with aching lungs. CX 1 at 133-36. At that time, the urgent care attendant determined that Claimant had a history of chlorine exposure but his lungs remained clear. TR at 129; CX 1 at 133-36, 279. The urgent care provider then referred Claimant to see a pulmonary specialist at Harborview. *Id.*

Unfortunately for Claimant, his symptoms, first having appeared immediately after his exposure to some chlorine derived fumes on February 16, 2000, persisted and never fully resolved as described below.

On March 1, 2000, Claimant, still having symptoms from the February 16, 2000 incident, returned for evaluation by Dr. Gabrielle Morris, an occupational medicine senior fellow working with Carl A. Brodtkin, M.D. at Harborview Medical Center, reporting of continued respiratory symptoms. These symptoms included: rhinorrhea, intermittent headaches which Claimant described as sinus-type, a bleach taste in his mouth, shortness of breath with exertion described as being able to walk only three blocks before needing a rest, coughing with intermittent gray/green sputum, which was worse when Claimant laid down at night, and intermittent aching in his chest with chest tightness and wheezing. He had somewhat improved breathing and no mental status changes with his eyes and skin being normal. CX 1 at 30.

Claimant emphasized to Dr. Morris that prior to the February 16, 2000 incident he could walk an unlimited number of blocks and perform various duties having to do with seamanship and fishing without getting out of breath. Claimant repeated at this time that he became out of breath after walking three level blocks. CX 1 at 30-31.

Claimant described his medical history to Dr. Morris up through February 16, 2000 as only significant for an abscessed tooth in 1996 or 1997 for which he was hospitalized for several days on antibiotics. Claimant told Dr. Morris that he never had asthma, that his family medical history was essentially negative, that he wasn’t taking any medications as of March 1, 2000. CX 1 at 31. Claimant did tell Dr. Morris that he smoked one pack of cigarettes per day for approximately 15 years and that he had stopped smoking cigarettes in 1980. Claimant also told Dr. Morris that in March 2000, Claimant smoked three cigars a day but he denied inhaling.

Claimant reported second hand smoke exposure and that his “significant” alcohol consumption ended in approximately 1989. *Id.*

On March 1, 2000, Dr. Morris described Claimant as a well-developed well-nourished somewhat gruff-looking middle-aged man in apparent distress. CX 1 at 31. Dr. Morris also noticed a strong smell of tobacco on Claimant. *Id.*

Dr. Morris also reviewed Claimant’s September 1999 and February 24, 2000 chest x-rays and commented that both chest x-rays were normal. CX 1 at 32. Dr. Morris further performed other objective tests including a spirometry. The spirometry revealed an FVC² of 83%, FEV 1³ of 77%, and FEV 1/FVC of 75%. The post bronchodilator showed a marked reduction: FVC was 52% of predicted which was a decrease of approximately 37%; FEV 1 was 50% of predicted which was a decrease of approximately 35%; and the FEV 1/FVC was 77%. Claimant reported feeling like he had hyperventilated from the lung testing. *Id.*

Dr. Morris opined as of March 1, 2000 that Claimant had a fairly significant chlorine exposure which likely caused Claimant irritation which explained his symptoms. CX 1 at 32. Claimant reported that most of his symptoms were slowly improving which fitted Dr. Morris’s irritant exposure diagnosis. Dr. Morris found the bronchodilator spirometry testing on March 1 to be inconsistent and he was unable to make a determination that the chlorine exposure acted as an asthmagen. Claimant’s earlier bronchodilator spirometry did show a very mild obstructive component. *Id.* Dr. Morris diagnosed Claimant on March 1, 2000 as having irritable bronchitis with mild improvement per patient history. *Id.* Claimant was prescribed an aerobid inhaler, an albuterol inhaler, peak flow readings over two weeks and repeat spirometry prior to his next visit. Claimant was also advised to avoid irritant exposure and smoke and told to return in two weeks.

Dr. Brodtkin, an occupational and environmental medicine and internal medicine physician experienced in occupational respiratory disease, also treated Claimant from March 1, 2000 to approximately August 30, 2001. CX 3; CX 6 at 463-65, 470. Dr. Brodtkin testified that when he treated Claimant in March 2000, Claimant was experiencing significant respiratory symptoms which continued for weeks and months thereafter. CX 6 at 472. Dr. Brodtkin diagnosed Claimant as having mucous membrane irritation and an irritant bronchitis, and irritant inflammation of Claimant’s upper respiratory tract. TR at 53; CX 6 at 482. Furthermore, Dr. Brodtkin opined that Claimant’s symptoms of wheezing and chest tightness also suggested a bronchiospastic component or potential asthmatic component to it. *Id.*

Dr. Gordon D. Rubinfeld, an attending physician also at Harborview, interpreted Claimant’s March 1, 2000 spirometry measurements and found them normal. CX 1 at 146-47. Dr. Rubinfeld also found Claimant to have mild hypoxemia and that Claimant was unable to give an adequate post-bronchodilator effort and also unable to do the diffusing capacity test. *Id.*

Dr. Brodtkin, Claimant’s treating physician, further opined that Claimant’s irritant conjunctivitis was caused by Claimant being exposed to very prominent irritants on February 16,

² Forced vital capacity.

³ 1-second forced expiratory volume.

2000, in an unusual exposure condition of an enclosed water tank while working with a bleach solution that mixed with a bilge fluid that contained various components of cleansers and caused a very prominent irritant reaction that was quite consistent with a chlorine gas exposure in an enclosed space. TR at 50-53; CX 6 at 483.

Dr. Brodtkin testified that a bleach solution used in cleaning is chlorine-based and has the irritating properties of chlorine. TR at 99. He further testified that bleach hypochlorite in bleach cleaning solutions was distinct from chlorine gas, CL₂, which was released and much more readily available for inhalation and was a much more potent irritant and toxin, although both of them had some irritant properties. *Id.* Chlorine gas was released when the bleach cleaning solution was mixed with something else. TR at 100. He further testified that in his experience, both seeing patients in clinic and copiously in the medical literature, reactions of bleach with other fluids, whether it be warm water solution, whether it be with a caustic like an acid or ammonia, can produce chlorine gas. TR at 123. Dr. Brodtkin further testified that regardless of the total volume, even one gallon of bilge water mixed with a chlorine bleach cleaning solution could have caused a chlorine reaction and fog described by Claimant as having occurred on February 16, 2000. TR at 142.

Mr. Deaver further testified that there was likely silty water at the bottom of the tank that collected from the Naknek water and the remaining silt after boiling water. CX 10 at 655. Mr. Deaver also confirmed that there was a lot of ammonia three stories up on the boat the day of the incident and that ammonia reacts “nastily” when mixed with chlorine or Chlorox bleach. CX 10 at 656. Mr. Deaver also testified that if the boat shifted, bilge water, comprised of oily water, soapy water, condensates from air compressors, and other “stuff that comes off engines” and creates a film that sits on top of water. This mixture could seep into the tank that Claimant had been cleaning so he recommended that rags be used to build a coffer dam to keep the bilge water out. CX 10 at 669-72; EX 14 at 14.314.323.

Dr. Brodtkin stated that he was provided with a history from Claimant and his medical records that on February 16, 2000, Claimant was exposed to a cloud gas that formed from a combination of bleach water mixed with bilge water from some location. TR at 122-23, 127. Dr. Brodtkin further opined that Claimant’s clinical symptoms changed dramatically on February 16, 2000 and Dr. Brodtkin believed that Claimant’s dramatic reaction was indicative of an irritant gas exposure that was beyond that of sodium hypochlorite or bleach in a solution. TR at 121.

Dr. Brodtkin treated Claimant from March 1, 2000 through August 2001. CX 6 at 477-78. Claimant was diagnosed by Dr. Brodtkin with work-related Reactive Airways Initiated Dysfunction Syndrome (“RADS”) and was unable to work from the February 16, 2000 date of the injury through March 9, 2000. TR at 53-54; EX 1 at 1.4. Dr. Brodtkin certified that Claimant was able to return to light duty work with additional restrictions that included no exposure to irritating fumes, vapors, dust, particulates, or any other environment which would irritate his lungs. *Id.*

On March 2, 2000, Dr. Brodtkin signed a Doctor’s Release For Work form stating that Claimant could return to work on March 3, 2000 with restrictions including no exposure to

irritants, light duty work, and no lifting over 15 pounds. TR at 112; CX 1 at 78. Dr. Brodtkin signed a similar statement on March 15, 2000 for Claimant. CX 1 at 79.

On March 3, 2000, Claimant signed a light-duty labor work contract with Labor Ready stating that Claimant was to work eight hours per day on light duty until he fully recovered from the February 16, 2000 incident and until he could return to full duty. A dispute arose between Claimant and Labor Ready as to the availability of light duty work and whether the jobs provided to Claimant were actually light duty work or more. EX 1 at 1.4-1.5.

One job that Claimant had after the February 2000 incident involved office work. TR at 176. Claimant testified that because of his dyslexia, he mixed things up and things were accidentally misfiled. *Id.* Another job Claimant attempted was working for Labor Ready at Safeco baseball field. TR at 111. Claimant reported to work every day until May 8, 2000, when he alleged that he was assaulted by another Labor Ready employee. EX 1 at 1.5. Claimant stated that he was assaulted at his job in May 2001, hospitalized, and felt “harassed” by his employer Labor Ready at that time as the jobs he received did not comply with Dr. Brodtkin’s restrictions against exposure to chemical cleaning fumes. EX 3 at 3.45. At some unknown point in time, Claimant filed a claim under the Act against Labor Ready.

On March 15, 2000, Dr. Brodtkin examined Claimant and found his lungs to have somewhat distant breath sounds with occasional scattered wheezes. CX 1 at 7. Dr. Brodtkin also administered a spirometry test to Claimant and found him to demonstrate a moderate obstructive impairment with FVC of 3.85 liters, FEV1 of 2.53 liters and FEV/FVC of .66 for an assessment of persistent respiratory symptoms, following irritant vapor exposure on February 16, 2000. *Id.*

Dr. Brodtkin also found Claimant continuing to experience prominent bronchitic symptoms of cough with additional symptoms of whistling and wheezing and dyspnea on exertion. *Id.* Dr. Brodtkin diagnosed Claimant with residual irritant bronchitis or RADS either of which he opined was considered work related on a more probable than not basis. TR at 54-55; CX 1 at 13. Dr. Brodtkin noted on March 6, 2000 that Claimant continued to smoke two cigars per day and Dr. Brodtkin counseled him again to minimize cigars and other respiratory irritants. *Id.*

Dr. Brodtkin also administered a methacholine challenge test to Claimant on March 29, 2000 and took Claimant off his medications prior to administering the test. TR at 54-61. Dr. Brodtkin testified that the senior protocol stipulated by the American Thoracic Society (ATS) in their 2000 publication stated that individuals have to be off their bronchodilator medications before a methacholine challenge test is administered; otherwise the presence of the continued medications “will substantially lower the sensitivity and would be a breach of the ATS protocol” thereby invalidating test results. TR at 57.

After the testing, Dr. Brodtkin assessed Claimant with RADS due to Claimant’s dramatic response to methacholine which confirmed significant bronchial hyperreactivity following Claimant’s irritant exposure to chlorine on February 16, 2000. TR at 54-61; CX 1 at 9-10, and 12. At that time, Dr. Brodtkin opined that Claimant’s cough, wheezing, and chest tightness were indicative of ongoing asthmatic reactions following Claimant’s irritant exposure. *Id.* Dr. Brodtkin

further opined that Claimant could perform light duty work with minimal exposure to irritating dust, fumes, or vapors which precluded many of Claimant's previous marine laborer activities. CX 1 at 10.

Dr. Brodtkin testified that in making the diagnosis of RADS, he carefully went through each of the criteria for this diagnosis and found that Claimant met each of the criteria because: (1) he had no prior respiratory complaints; (2) he experienced a significant incident of exposure on February 16, 2000 - to irritating vapor and chlorine gas; (3) at the time of the exposure, he experienced prominent asthma-like or respiratory symptoms in the first 24 hours that extended to three months after the exposure involving not only cough and phlegm but wheezing and shortness of breath. TR at 72-74. Furthermore, Dr. Brodtkin testified that Claimant had the additional criteria of: (4) having evidence of airflow obstruction on objective tests; (5) a positive methacholine test; and (6) no other plausible explanation for the sudden development of respiratory illness in March 2000. TR at 74. Dr. Brodtkin concluded by opining that each of the above-referenced criteria are necessary and essential for RADS and Claimant clearly meets all of those criteria.

On March 29, 2000, Dr. Brodtkin signed a "To Whom It May Concern" letter for Claimant stating that due to Claimant's work-related lung condition, he should continue to avoid irritating dust, fumes, or vapors and that his activities should be restricted to light duty. CX 1 at 199.

On April 19, 2000, Dr. Vandy L. Sherbin interpreted Claimant's expanded pulmonary test results. CX 1 at 12-13. Dr. Sherbin, a pulmonary medicine physician, reviewed Claimant's March 2000 lung volumes, mechanics, diffusing capacity, and methacholine challenge test results and found mild air flow obstruction with normal lung volumes and a moderate decreased diffusing capacity. *Id.* The methacholine challenge test results to Dr. Sherbin showed mild hyperresponsive airways. CX 1 at 13.

Dr. Brodtkin further testified that Claimant also developed some significant psychiatric symptoms of depression following the February 16, 2000 incident. CX 6 at 472. Dr. Brodtkin testified that Claimant developed depression in temporal association with his respiratory difficulty and referred Claimant to Dr. Michael Horne, a psychiatrist, also at Harborview. CX 6 at 472-73. Dr. Brodtkin believed that Claimant was extremely disturbed by his change in physical ability, loss of physical exertion and not being able to tolerate irritant exposures which would aggravate Claimant's respiratory symptoms. CX 6 at 472. Dr. Brodtkin observed Claimant experiencing feelings of helplessness, hopelessness and something that was on Claimant's mind a lot which disturbed his sleep and made him clinically depressed. *Id.*

Prior to the February 16, 2000 incident, Claimant had had previous depressive episodes, but none requiring treatment. Throughout his life, Claimant had had possible hypomanic episodes, also untreated. He had had a past history of heavy alcohol abuse and abuse of narcotics and stimulants. Claimant testified that prior to the February 16, 2000 incident, he had been clean and sober for 8-10 years and attended Alcoholics Anonymous ("AA"). EX 3 at 3.39.

Claimant was treated at Harborview by Dr. Horne for psychiatric issues related to the February 16, 2000 incident from May 2000 through approximately April 20, 2001. EX 3 at 3.41. Dr. Michael Horne, the treating psychiatrist, first evaluated Claimant on May 26, 2000. CX 1 at 70-71; EX 3 at 3.39. Dr. Horne concurred with Dr. Brodtkin in May 2000 diagnosing Claimant with major depressive disorder, moderate, and alcohol dependence in remission. CX 1 at 71. He also noted a moderate impairment in social and occupational functioning. EX 3 at 3.40. Dr. Horne first prescribed Zoloft 50 mg at bedtime for Claimant. By June 2, 2000, Claimant's mood improved but his associates at AA advised him not to take Zoloft so he switched to Paxil 20 mg. *Id.*

By late June and early July 2000, the Paxil was helping Claimant and he was beginning to adjust to the change in his life circumstances. Dr. Horne found Claimant to be moderately depressed at this time. EX 3 at 3.40. By July 7, 2000, Claimant was noted to have improved and was mildly depressed, no suicidal ideation, normal thought flow, form and content. *Id.* By July 14, 2000, Dr. Horne opined that Claimant's mood was much improved and that he was coping well with daily activities, taking 30 to 40 mg of Paxil.

Claimant's depression would fluctuate between mild and moderate through mid-August 2000. CX 1 at 46-63. Events like the long wait for insurance compensation and a more difficult living situation negatively affected Claimant's depression while Dr. Horne found that by working on his computer, Claimant would lessen his depression. *Id.*; EX 3 at 3.40.

On July 19, 2000, Claimant saw Dr. Brodtkin who assessed him with RADS and being stable at the time although Claimant had persistent respiratory symptoms. CX 1 at 227-28. Claimant told Dr. Brodtkin that he was still smoking two cigars per day although denying that he inhaled them. CX 1 at 227.

On September 8, 2000, Claimant was drinking alcohol again and felt remorse and shame as he reported to Dr. Horne. EX 3 at 3.40.

On September 15, 2000, Dr. Horne wrote a "To Whom It May Concern" letter regarding Claimant and wrote that when Claimant was first referred to him in early 2000, he suffered from Post Traumatic Stress Syndrome and Major Depressive Disorder secondary to the psychological effects of his chemical inhalation. CX 1 at 181. Dr. Horne further wrote that Claimant was taking Paxil 40 mg. and having weekly psychotherapy and that Claimant had made some improvement but continued to have significant symptoms of depression, which Dr. Horne believed were caused by the lifestyle change Claimant had had to make and the delay in settling his insurance claims. *Id.* Dr. Horne concluded the letter by stating that he would anticipate that Claimant would need treatment at the above-referenced level for six more months. *Id.*

On September 29, 2000, Claimant felt better because he had received his first compensation check and was hoping to purchase a small boat that he could live on. In addition, Claimant was getting a new set of false teeth. On October 6, 2000, Dr. Horne found Claimant to be mildly depressed. *Id.*

On November 1, 2000, Dr. Brodtkin signed a "To Whom It May Concern" letter regarding Claimant stating that Claimant was being treated for occupationally-related RADS and that Claimant was restricted to light duty with minimal exposure to irritating dusts, fumes, or vapors. CX 1 at 120. Dr. Brodtkin further stated that Claimant's RADS condition would likely require chronic treatment and restrictions and Dr. Brodtkin did not anticipate resolution of Claimant's RADS given the activity of Claimant's ongoing respiratory symptoms over an eight-month period. *Id.*

Also on November 1, 2000, Dr. Brodtkin examined Claimant and assessed him with RADS secondary to exposure to chlorine gas in a confined space while at work. CX 1 at 204. Dr. Brodtkin opined that Claimant's respiratory status had been fairly stable since his last visit on March 15, 2000. CX 1 at 203-04.

On December 15, 2000, however, Dr. Horne found Claimant to be moderately depressed again. He was depressed because he missed his daughter and he lamented about how life might have been different had he made different career choices. His depression continued to fluctuate between mild and moderate through February 2001 depending on whether there was any progress with his legal matters. EX 3 at 3.40.

On December 29, 2000, Dr. Horne wrote a "To Whom It May Concern" letter regarding Claimant and wrote that when Claimant was first referred to him in early 2000, he suffered from Post Traumatic Stress Syndrome and Major Depressive Disorder secondary to the psychological effects of his chemical inhalation. CX 1 at 72. Dr. Horne further wrote that Claimant was taking Paxil 40 mg. and having weekly psychotherapy and that Claimant had made some improvement but continued to have significant symptoms of depression, which Dr. Horne believed were caused by the "massive life style [sic] change" Claimant had had to make and the "protracted legal proceedings" that he had had to endure. *Id.* Dr. Horne concluded the letter by stating that he would anticipate that Claimant would need treatment at the above-referenced level for at least the next year. *Id.*

Dr. Horne opined that by February 9, 2001, Claimant's depression was moderately well controlled and that Claimant's anxiety was more problematic than his depression in relation to Claimant's uncertainty with his potential insurance company settlement. EX 3 at 3.40. On February 23, 2001, Dr. Horne noted that Claimant had a lifelong difficulty being dependent on others and was mildly depressed. *Id.*

On March 6, 2001, Claimant was examined by Dr. Brodtkin who found him to continue to have active bronchitic symptoms and symptoms consistent with airway hyperreactivity. CX 1 at 15. Dr. Brodtkin found that Claimant continued to have trouble with cold and exertion and that Claimant's overall condition remained relatively stable and symptomatic. *Id.* Given these unchanged symptoms and the length of time since the February 16, 2000 incident, Dr. Brodtkin considered it highly unlikely that Claimant would experience resolution of this condition. *Id.* Dr. Brodtkin further opined that Claimant could not return to his work as a merchant marine sailor or laborer and confirmed that Claimant's only ability to work included light duty work with no exposure to irritating dust, fumes, or vapors which is not compatible with his prior work

activities and training. *Id.* Dr. Brodtkin planned for Claimant to obtain a full pulmonary function testing to assess the level of impairment one year following irritant exposure to chlorine. *Id.*

After the February 2000 incident, Claimant tried to find work using the Washington State Vocational Employment Services (WSVES). TR at 182. Claimant decided to stop dealing with them and told WSVES not to bother calling him again because he did not like that someone at WSVES asked him five or six times about his race. TR at 182-83.

In March 2001, Claimant was feeling depressed because he had not made progress with settlement of his claim. In addition, Claimant reported that he had stopped his respiratory medication for follow-up pulmonary tests and was coughing more and experiencing increased shortness of breath. *Id.*

On March 15, 2001, Claimant was given follow-up pulmonary function tests at the Harborview Pulmonary Function Laboratory. CX 1 at 37-8. His test results were interpreted by Dr. Len Schnapp who opined that the tests showed a mild airflow obstruction with evidence of air trapping and a positive response to inhaled bronchodilators. *Id.* Dr. Schnapp further opined that Claimant's FEV1 remained unchanged from the same test in December 2000, and that the reduction in the diffusing capacity suggested a loss of alveolar capillary surface area. *Id.*

By March 16, 2001, Claimant expected to receive money from an insurance settlement and was planning to buy a boat. *Id.*; EX 1 at 1.11-1.18. Claimant, his lawyer, and lawyers for Labor Ready, but *not* Employer in this case, signed a settlement agreement approved on April 30, 2001 settling Claimant's case against Labor Ready under section 908(i) of the Act. Claimant, among other things, received \$10,000 in settlement with Labor Ready for compensation benefits, future medical benefits, and additional monies for past medical expenses incurred through the date of settlement but not invoices for psychiatric care. EX 1 at 1.10-1.18. At that time, Dr. Horne decreased Claimant's Paxil dosage to 40 mg. and found him coping better and moderately depressed. EX 3 at 3.40.

By March 23, 2001, Dr. Horne opined that Claimant was less depressed and anxious. On March 30, 2001, Dr. Horne noted that Claimant had received some financial support and had purchased a computer and beeper and was feeling more financially secure. EX 3 at 3.40-3.41.

In April 2001, Claimant's psychological condition fluctuated with the settlement of his claim against Labor Ready. EX 3 at 3.41. Claimant was angry from the delay in payment of his settlement but overall his depression improved. *Id.* Dr. Horne found Claimant's mood much improved after the claim finally settled in mid-April or May 2001 and Claimant was dealing with his identity change and realized that he would not be going to sea again. *Id.* Claimant was able to purchase a 26 ft. boat that he later traded for a 27 ft. boat. EX 3 at 3.45.

Claimant testified that he lives on a boat anchored on an arbor at Eagle Harbor in Bainbridge Island with his cat and that he prefers living alone and that he is not a very social guy. TR at 168-69, 172. He further testified that he goes to shore on average about two days a week and that it is a couple hundred yards from his boat to shore and that he uses a rowboat to get from his boat to shore. TR at 173. Claimant does not own a car. TR at 174.

On April 17, 2001, Claimant saw Dr. Brodtkin who assessed Claimant with RADS and opined that Claimant continued to have active respiratory symptoms partially controlled by his medications. CX 1 at 39. Dr. Brodtkin noted that Claimant had reduced his tobacco intake from 10 to 2 cigars daily. CX 1 at 76. Claimant testified that he has never smoked as many as ten cigars a day but that he had smoked five or six cigars a day during his life. TR at 120, 163. Dr. Brodtkin opined that Claimant could not return to his former merchant marine/labor activities due to the heavy lifting and exposure to irritating dust vapors required by the work. *Id.* Dr. Brodtkin also rated Claimant using the American Medical Association (“AMA”) Guidelines for Permanent Impairment for Asthma and estimated Claimant’s whole person impairment at 50% based on Claimant’s symptoms and pulmonary test results. CX 1 at 40. Dr. Brodtkin opined that Claimant should strictly avoid work with any significant exposure to irritating dust, fumes, vapors, or anything more than light duty. *Id.* Finally, Dr. Brodtkin made no assessment about any noted depression and considered Claimant’s respiratory condition stable enough to postpone any further examinations for four months. CX 1 at 77. Dr. Brodtkin testified that in April 2001, Claimant “had reached a fixed and stable status with ongoing asthma, RADS, and that this was likely after a year to be a persistent condition.” TR at 62-63, 114. Dr. Brodtkin further opined that it was more probable than not that Claimant’s respiratory condition was permanent. TR at 62.

Claimant testified at hearing that he could only walk a couple of blocks on level ground and one-half to one block on a downtown Seattle-type incline without feeling the negative respiratory effects of his February 2000 injury. TR at 155. Dr. Brodtkin also opined that Claimant was only able to walk a couple of blocks without getting short of breath. TR at 64. Dr. Brodtkin also testified that Claimant has been unable to return to his former work and level of exertion due to his respiratory symptoms and that this will continue indefinitely. TR at 64-65.

Claimant also testified that he has a persistent cough related to the February 2000 incident. TR at 155. He stated that Dr. Brodtkin has told him to not smoke anymore. TR at 161. At trial, Claimant testified that he was smoking five or six puffs of cigar and occasionally smoking cigarettes at that time. TR at 162. Dr. Brodtkin testified, however, that based on his discussion with Claimant on September 13, 2004, Claimant was smoking one rolled cigarette for which he took four or five puffs and chewed cigar tobacco. TR at 70-71.

On April 20, 2001, Dr. Horne noted that Claimant’s depression was much improved and opined that Claimant could lower his dosage of Paxil with no return of symptoms with the overall plan to slowly discontinue Claimant’s antidepressant medication. EX 3 at 3.41. Dr. Horne believed that Claimant had reached improvement such that further psychotherapy sessions would only occur if needed if Claimant called. Claimant called. *Id.* At no time did Dr. Horne provide any work restrictions for Claimant based on psychological impairment although major depression and scheduled therapy sessions would most likely render one unemployable. TR at 228.

In June 2001, Claimant decided he did not like being on medications so he quit taking his psychiatric medications. EX 3 at 3.45.

On August 30, 2001, Dr. Brodtkin last treated Claimant and opined that through that date, Claimant had ongoing depression that was stable and controlled by medications and psychotherapy. CX 1 at 243; CX 6 at 478. Dr. Brodtkin admitted that his focus at that time was on Claimant's respiratory condition and not his psychiatric condition. CX 6 at 478. Dr. Brodtkin found Claimant stable with active respiratory symptoms consistent with occupational asthma with RADS. CX 1 at 5. Dr. Brodtkin continued to prescribe Flovent and Serevent with use of Albuterol to control his symptoms. *Id.*

Claimant testified that sometime in August 2001, he took a job as a cleaner with the Millionaire's Club. TR at 177,180. Claimant further testified that he was let go and replaced in that job because he could not use a leaf-blower as required. TR at 177-80. From being let go from his job at the Millionaire's Club in 2001 until one or two weeks before trial in September 2004, Claimant did not look for work. TR at 174-75, 178-80.

Dr. Brodtkin also noted that Claimant told him that he had attempted working for the Millionaire's Club during the past three to four weeks but Claimant noted difficulty with his stamina as well as reaction to dust and other irritant exposures. CX 1 at 4. Dr. Brodtkin also noted that Claimant told him that the day before Claimant tried to use a blower, he experienced prominent respiratory symptoms due to the airborne dust and was terminated because he was not able to perform his full duties. *Id.*

In October 2001, Claimant ran out of money and had to go on welfare GAU. EX 3 at 3.45. Claimant stated that he found himself getting angrier and being "flipped out" and getting referred back to Harborview Medical Center. *Id.*

Claimant stated that in the Fall of 2001, he was "going crazy, screaming, yelling, fist fights" and admitted occasionally drinking alcohol and that he always had a problem with anger dyscontrol, "fist fights in a heartbeat" when he drank alcohol. EX 3 at 3.45.

On February 8, 2002, Dan Neims, a clinical psychologist, conducted a psychological evaluation of Claimant and signed his evaluation report of the same date for Claimant's application for Social Security Income ("SSI") disability aid. CX 2 at 316-321. Dr. Neims administered several tests to Claimant including the Trail Making Test ("TMT"), the Rey 15 Factor Test, the Hamilton Psychiatric Rating Scale for Depression ("HAM-D"), the Hamilton Psychiatric Rating Scale for Anxiety ("HAM-A"), and the MSE. He also conducted an interview and reviewed Claimant's background data and information in Claimant's chart at the Department of Social and Health Services ("DSHS"). CX 2 at 316.

Dr. Neims found Claimant reported a history of alcoholism and noted daily consumption of "whiskey and beer outlining blackouts, withdrawal and cravings." CX 2 at 318. Claimant reported that he had last consumed alcohol in the summer of 2001 when he consumed a 12-pack of beer. *Id.* Claimant also told Dr. Neims that he ceased consistent consumption approximately 14 years ago. *Id.* Claimant reported that his last work was in 2000 when he detailed having been exposed to chlorine gas resulting in reported lung difficulties. *Id.*

Dr. Neims diagnosed Claimant as having Major Depressive Episode, marked without psychotic features, an impulse control disorder not otherwise specified (“NOS”)(provisional), and alcohol dependence in reported continuous remission, and cannabis abuse, in reported remission as to Axis I. CX 2 at 318. Dr. Neims also found Claimant as having an Axis II personality disorder NOS (antisocial and paranoid traits), primary diagnosis. *Id.* Dr. Neims concluded by stating that Claimant was an appropriate candidate for Social Security Disability assessment. CX 2 at 321. He further stated that Claimant’s characterological and mood related problems in combination with physical issues would leave it very difficult for Claimant to re-obtain sustained gainful employment. *Id.*

Dr. Brodtkin and Dr. Hamm⁴ testified, however, that the February 2002 psychological evaluation of Claimant by Dr. Neims did not discuss causation in association with Claimant’s mental health problems including his inability to work with the public and get along with supervisors on the one hand, and the February 16, 2000 incident on the other hand. TR at 253-54; CX 6 at 481-82.

Dr. Hamm also testified that Claimant had stopped taking his psychiatric medication in the fall of 2001 and was drinking and that the time he returned to the medication the following year it was shortly before seeing Dr. Neims. TR at 267-68. Dr. Hamm opined that this was significant as to the level of Claimant’s depression and because of this, Claimant was a little more depressed when he saw Dr. Neims than he was when he saw Dr. Hamm almost two months later, with anger as the main complaint. *Id.*

On February 26, 2002, Claimant was examined one time and evaluated by Employer’s independent medical examiner (“IME”) Brent T. Burton, M.D. M.P.H., a toxicologist. TR at 303, 305; EX 2; EX 9. Dr. Burton examined Claimant for the purpose of evaluating his respiratory status in regard to his alleged occupational exposures to chemical substances during the course of his employment at Employer. EX 2 at 2.21. Claimant testified that he did not discontinue his medications before the February 26, 2002 tests and he did not receive any letter or any kind of communication from Dr. Burton’s office saying that he should discontinue his respiratory medications prior to Dr. Burton’s examination. TR at 105-06, 153-54. At trial, Dr. Burton stated that he did not have any documentation that would normally go out to tell patients to stop their medications before the methacholine challenge test. TR at 297-300. Only Dr. Hamm testified that there was a note in Dr. Horne’s records indicating that Claimant had stopped his respiratory medications before seeing Dr. Burton. TR at 254, 263-64. Dr. Horne’s records submitted at trial did not extend, however, to February 2002 or thereafter, and there is no evidence that Claimant was treated by Dr. Horne in or after 2002.

Also at that time, Claimant stated that he previously smoked up to three packs of cigarettes per day but when he met with Dr. Burton he was down to two cigars per day. EX 2 at 2.25. Claimant admitted that he did not count the cigarettes that he rolls himself and that these count for two to three cigarettes per day. EX 2 at 2.25-26. Claimant told Dr. Burton that he averaged one or two alcoholic beverages per month. EX 2 at 2.26. Claimant admitted to being

⁴ Dr. Hamm was the independent medical examiner psychiatrist retained by Employer to examine Claimant and opine about his mental condition after their one meeting on March 29, 2002. Dr. Hamm is described further at p. 19 of this Decision.

arrested for driving under the influence of alcohol in 1997 or 1998. *Id.* Claimant also stated that he stopped using marijuana in the late 1990's. *Id.*

Dr. Burton administered a comprehensive pulmonary function test to Claimant on February 26, 2002 and established a baseline FVC of 4.97 liters (111% predicted) and FEV1 was 3.21 liters (89% predicted). EX 2 at 2.33. Dr. Burton found Claimant's lung volumes were within the normal range as were his diffusing capacity and oxygen saturation. *Id.* Dr. Burton also assessed Claimant's bronchial hyper-reactivity by administering a methacholine challenge to a maximum dose of 25 mg/ml. *Id.* Dr. Burton found that Claimant tolerated all doses of methacholine with a maximum dose of 20% and that this indicated normal bronchial responsiveness. *Id.*

Dr. Burton opined that any diagnosis of RADS was erroneous because the exposure was insignificant and that, instead, Claimant has mild chronic obstructive pulmonary disease ("COPD"), the sole result of Claimant's long-term cigarette smoking habit and continuing exposure to the products of combustion from consumption of cigars and his own rolled cigarettes as documented by high-resolution chest CT scan. TR at 272-73, 285-89, 296-97; EX 2 at 2.33-35. Dr. Burton stated that as further evidence that Claimant did not have RADS, Claimant did not describe severe coughing paroxysms with chest pain, shortness of breath, severe ocular and upper airway irritant symptoms that would indicate a significant exposure to hypochlorite solution or any other irritant substance as a required precursor to RADS. TR at 276-77; EX 2 at 2.34. Dr. Burton also stated that Claimant did not express the necessary symptoms and did not have the required clinical course, physical findings, pulmonary function studies, or radiographic data to document a RADS condition. TR at 278-89; EX 2 at 2.35.

Dr. Burton, unqualified as a psychiatrist or psychologist, concluded by opining that there was a strong possibility that Claimant had an underlying personality disorder which might have played a strong role in the presentation of Claimant's depression symptoms. EX 2 at 2.35. Dr. Burton pointed to Claimant's antisocial tattoos including an eagle and swastika as an example of antisocial features. *Id.* Claimant also had a "666" tattooed on his right hand. EX 3 at 3.48. Despite Claimant's alleged personality disorder and mild COPD, Dr. Burton opined that Claimant could engage in the activities required of a deck hand as well as his usual duties. *Id.*

Dr. Brodtkin testified that he reviewed Dr. Burton's report (EX 2) and took exception to a number of things in the report. TR at 75-76. For example, Dr. Brodtkin opined that Dr. Burton's report unfairly minimized Claimant's symptoms and his present respiratory illness and mischaracterized findings of other health care evaluations that Claimant received near the time of the February 2000 incident that noted significant respiratory symptoms. TR at 75-76, 129-30, 138-39. For example, Dr. Brodtkin opined that on February 24, 2000, Claimant experienced significant symptoms of shortness of breath with exertion, had a new cough, and his lungs ached following a visible gas exposure of eight to ten minutes. TR at 129. In addition, Dr. Brodtkin opined that the ambulance records from February 16, 2000 reflect Claimant with chest discomfort, respiratory difficulty, and a rapid respiratory rate also considered significant by Dr. Brodtkin. TR at 130. Dr. Brodtkin continued to opine that he agreed with Dr. Burton's observation of Claimant's active wheezing and Claimant's respiratory medications at that time. *Id.*

Dr. Brodtkin, however, opined that the methacholine test administered to Claimant by Dr. Burton was invalid because there was nothing in the report to indicate that Dr. Burton told Claimant to stop using his respiratory medications of Albuterol, Seravent, and his steroid medication Flovent prior to taking the test. TR at 58-61, 76-78. Claimant indicated to Dr. Brodtkin that he did not discontinue medication prior to his testing with Dr. Burton. TR at 105-06, 154. Dr. Brodtkin testified that taking these medications can substantially lower the sensitivity of a methacholine test and by not stopping the medications at least 48 hours before testing, Dr. Burton violated the ATS protocol for performing methacholine tests. *Id.*; TR at 103-04. Even so, Dr. Brodtkin opined that the results of Dr. Burton's methacholine test even influenced by his respiratory medications show that Claimant received a borderline positive test result for respiratory impairment. TR at 77, 104. Dr. Brodtkin concluded by stating that in Dr. Burton's methacholine test, Claimant's FEV1 decreased 20 percent with 25 milligrams methacholine. TR at 108. Dr. Brodtkin further stated that ATS criteria say that a 16 to 25 percent decrease is a borderline response. *Id.*

Dr. Brodtkin also testified that COPD is a much broader term than RADS and is typically found with emphysema and chronic bronchitis which most commonly are smoking related conditions. TR at 72. Dr. Brodtkin further opined that COPD is a condition that develops over years and years of exposure and is typically not a condition that develops within minutes from a traumatic event. *Id.* While Dr. Brodtkin believed that Claimant likely has mild, early COPD based on the CAT scan findings of early emphysema in the spring of 2001, he did not think Claimant's COPD had anything to do with Claimant's RADS respiratory condition. TR at 71, 79. Dr. Brodtkin further testified that Claimant would not have been able to work up to February 16, 2000 in his active and heavy labor work with COPD and he would have had a lot of trouble working with bleach on February 14 and 15, 2000 if he had COPD. *Id.*

On March 29, 2002, Claimant attended a two-hour independent medical examination ("IME") with John E. Hamm, M.D., a psychiatrist retained by Employer. EX 3 at 3.39-3.50; EX 10 at 10.265-10.268. Dr. Hamm reviewed Claimant's medical records and administered the MMPI-2 and MCMI-III to Claimant after the examination. EX 3 at 3.41. At that time, Claimant told Dr. Hamm that he was still living on his 27 foot sailboat in Eagle Harbor off Bainbridge Island and that he came over to the island twice a week to get food from the food bank. *Id.* Claimant also told him that his only form of income came from GAU assistance and at that time Claimant was pursuing a third party lawsuit against the *Pribiloff*.⁵ *Id.* Claimant also told Dr. Hamm that he could not work because of his "asthma." *Id.* Claimant also reported that he continued to use inhalers for his pulmonary difficulties and used Comvent for emergencies approximately two to five times a week and Serevent and Flovent on a daily basis as preventative medication. *Id.*

⁵ On June 7, 2002, the U.S. District Court for the Western District of Washington at Seattle granted Employer's motion for summary judgment causing dismissal of Claimant's third party action against Employer holding that under the application of the "borrowed employee" doctrine, as articulated in federal or state law, Employer qualified as Claimant's borrowing employer for the purpose of § 905(b) of the Act. In response to Claimant's attempt to argue that Employer was barred from the status as Claimant's employer because of Claimant's settlement with Labor Ready under section 908(i) of the Act, the District Court ruled in Employer's favor and held that Employer was not collaterally estopped from raising the issue of whether it was Claimant's employer because Claimant had not demonstrated to the Court why a settlement with Labor Ready bound Employer, a non-party. *See* Ex 3 to Employer's Expedited Motion for Summary Decision filed July 13, 2004 in this case.

Also on March 29, 2002, Claimant reported to Dr. Hamm that he was treating with Dr. Hsiao, a psychiatrist, at Harborview Medical Center and was taking 80 mg. a day of Paxil and had been on that dosage since January, 2002. EX 3 at 3.42. Claimant stated that he also took Remeron 15 to 30 mg. and Ambien 10 to 20 mg. at bedtime two to three times a week to help him sleep. *Id.* Claimant also stated that he had been taking this medication since he was hospitalized at Harborview Medical Center involuntarily for about 14 hours in December 2001 because since June 2001, he was off all psychiatric medications and had a homicidal ideation of killing his lawyer. EX 3 at 3.42 and 3.45-3.46. Claimant had been angry at lawyers and “system life in general.” Ex 3 at 3.45. When Claimant was involuntarily hospitalized, he was assessed with depression, not otherwise specified (NOS). CX 1 at 190-193. At that time, Claimant denied having used alcohol or drugs for “several years.” CX 1 at 192.

As of March 29, 2002, Claimant stated that he saw Dr. Hsiao about twice a month and that he was better on medicines and should not have discontinued his psychiatric medications in June 2001. EX 3 at 3.45-46. Claimant stated and Dr. Hamm opined that the Paxil and sleeping medications helped Claimant calm him with his anger or rage problem. *Id.*

Claimant told Dr. Hamm that although he is an alcoholic, he occasionally still used alcohol and had drank shots of alcohol within a month of his visit to Dr. Hamm and had drank a 12-pack of beer the summer before while fishing. EX 3 at 3.42. Claimant also told Dr. Hamm that he was still smoking cigarettes despite his lung problems in March 2002 and was smoking $\frac{3}{4}$ oz. of tobacco over a four to five day period. *Id.*

Dr. Brodtkin testified that after reviewing Claimant’s medical record history, Dr. Brodtkin did not see any indication that Claimant’s cigarette smoking habit had ever caused him any restriction in his work prior to the February 16, 2000 incident. TR at 143.

Claimant admitted to Dr. Hamm to previously using marijuana on a regular basis but claimed to have quit a long time ago and denied use as of that time. EX 3 at 3.42. Claimant also admitted to prior use of heroin, cocaine, and methamphetamine. *Id.*

At the March 29, 2002 evaluation with Dr. Hamm, Claimant stated that his mood with his medications was “a lot better” and he stated that he did not have much anger, but that he did not like being around people very much. TR at 249-50; EX 3 at 3.46. Claimant said that his memory and concentration and his cognitive functioning were normal. *Id.* Claimant said that he spent a lot of time on his boat alone and he did not like to be around people very much. *Id.* Claimant also told Dr. Hamm that he did not get a lot of pleasure out of life but did not think that he was anxious. *Id.* Claimant stated that the social environment with which he felt most comfortable was “going to a bar” and that he did not fit in well with some segments of society. *Id.*

Dr. Hamm also administered the two psychological tests referenced above to Claimant and found Claimant with “chronically mild to moderate impairment in his social functioning due to his personality disorder and chronic mood instability and chemical abuse problems.” EX 3 at 3.49. Dr. Hamm further found Claimant to be functioning at a level compatible with his pre-injury or pre-February 16, 2000 level of functioning and capable of gainful employment. *Id.*

Dr. Hamm further opined that the February 16, 2000 incident had neither caused nor permanently aggravated Claimant's mental health condition and that Claimant's mental health condition did not prevent him from gainful employment. EX 3 at 3.50. Dr. Hamm concluded by opining that even though Claimant did have mental health problems, these personality problems were "chronic and probably pre-existed his 2-16-00 injury." TR at 251; EX 3 at 3.50. Dr. Hamm also concluded by opining that Claimant has had anti-social or social problems with anger his whole life with small quantities of alcohol probably bringing out a lot of anger. TR at 251. Dr. Hamm further opined that Claimant has managed his anti-social problems in the past "by just being in situations where he doesn't have to deal with a lot of people." *Id.* Dr. Hamm recommended that Claimant abstain from alcohol and marijuana, continue regular use of Paxil, and work "within a social environment that is tolerable to him [Claimant]." TR at 252.

Claimant, however, denied needing to seek a psychiatrist for mental health issues prior to the February 2000 incident because he was "great." TR at 164.

Dr. Hamm further opined that Claimant's psychiatric records indicated that Claimant was responsive to the Paxil medication and he had improvement in his depression unless he went off his medication or used alcohol. TR at 246. Claimant told Dr. Hamm that when he was on Paxil, he was calmer, less angry, and functioning and feeling better. TR at 248.

Dr. Hamm further confirmed that prior to the February 16, 2000 incident, Claimant had several years of transient and temporary jobs moving around the country. TR at 246. Dr. Hamm said that Claimant described himself as a loner who did not trust people and spent his social life basically at a bar, occasionally attending an Alcoholics Anonymous meeting. TR at 247.

On February 10, 2003, Claimant was convicted and jailed for 25 days for displaying a weapon and two counts of assault and fined \$500 by a Kitsap County District Court Judge. TR at 185; EX 6 at 6.95-6.107. Claimant was convicted for assaulting Wayne M. Lajune and Glen P. Kelly in an incident at two taverns in Kingston, Washington that occurred on September 1, 2002. *Id.*; TR at 204. Mr. Kelly testified at trial that on September 1, 2002, Claimant came into the Drifter's Tavern, asked for a beer, and was told to leave by the barmaid when he refused to put his 10 inch knife in his car. TR at 206-207. He further testified that Claimant got into a heated exchange with the barmaid and, when asked to leave, Claimant stepped back from his barstool and, unprovoked by Mr. Kelly, Claimant hit him hard enough to knock him off his barstool. TR at 207 and 209-10; EX 6 at 6.102. Mr. Kelly further testified that in the course of his brief encounter with Claimant, Claimant spit on his leg and did not appear to be a fragile person or to be out of breath, winded, or exhausted, and instead, appeared to be looking for a fight and was intimidating. TR at 207-212; EX 6 at 6.102-03.

Also on September 1, 2002, Claimant was involved in a second incident that preceded the incident referenced immediately above. EX 6 at 6.102-03. Wayne Lajune, the second assault victim gave a statement that he was at a bar called the Basement when Claimant arrived at around 3:30 p.m. appearing already intoxicated. *Id.* Mr. Lajune witnessed Claimant drinking three drinks quickly and harassing some of the women inside the bar. *Id.* Mr. Lajune alerted the bartender of Claimant's conduct and he was cut off from more drinks just before Claimant

slapped Mr. Lajune with his open hand across his right cheek. *Id.* Mr. Lajune further reported that Claimant pulled his knife out of its sheath in an intimidating manner at least three different times. *Id.* Finally, Mr. Lajune reported that Claimant when holding his knife said that he could kill Mr. Lajune and that because Claimant had been in Vietnam, was a POW for four years, and due to his mood swings, Claimant would get nine months, presumably in jail, at worst. *Id.*

Lastly on September 1, 2002, Claimant offered Marcy D. Sawyer \$900 if she would abandon her boyfriend at the Basement bar and leave with Claimant for the night. EX 6 at 6.103.

Claimant testified about his assault charges that he had been out drinking and had slammed enough drinks to make him drunk. TR at 197. Claimant did not remember anything else except waking up in jail. *Id.*

On August 12, 2003, before Administrative Law Judge Jennifer Gee, Employer filed an Expedited Motion for Summary Decision in this case which was denied by order issued September 4, 2003. At that time, Judge Gee found that under Section 8(i) of the Act, since Norquest was not a party to the settlement, Claimant's April 2001 settlement with Labor Ready did not discharge Norquest's obligations under the Act.

On August 31, 2003, in the County of Kitsap, State of Washington, Claimant knowingly possessed a firearm after having been previously convicted of a serious offense of first degree robbery in New York in September, 1970. EX 6 at 6.104. In a statement of probable cause dated August 31, 2003, Officer S. Anderson searched Claimant's residential sailboat and found a ship's compass that was previously reported stolen. EX 6 at 6.108.

Claimant was arrested and searched and the police found a small quantity of marijuana in Claimant's left front pocket and a Winchester 1300 Defender shotgun with a pistol grip. *Id.* A background check showed that Claimant had previously had several felony convictions. *Id.* Finally, a baggie of marijuana was found in a wooden box aboard the sailboat which Claimant admitted belonged to him. *Id.*

On October 2, 2003, Claimant was convicted of unlawful possession of a firearm in the second degree and served time in jail from August 31 to November 15, 2003. TR at 183-84; EX 6 at 6.109-15. Claimant was also convicted at that time of possession of stolen property in the second degree and ordered to serve 90 days in jail. *Id.* The judgment and sentence of October 2, 2003 also referenced Claimant's criminal history of convictions and sentencing for forgery in 1966 in Los Angeles, California, robbery in 1967 in Columbia, New York, theft in 1975 in Jackson County, Oregon, unlawful possession of a firearm in 1980 in Northhampton, Massachusetts, possession of a sawed-shotgun in 1984 in Easley, South Carolina, and the assault in September 2002 referenced above. EX 6 at 6.109-10.

On August 4, 2004, I denied Employer's renewed expedited motion for summary decision as Employer repeated the same arguments previously denied by Administrative Law Judge Gee in August 2003. I followed Judge Gee's earlier finding that under Section 8(i) of the Act, since Norquest was not a party to the settlement, Claimant's settlement with Labor Ready did not discharge Norquest's obligations under the Act. Furthermore, I found that Section 933(g)

was inapplicable in this case as Labor Ready's 8(i) settlement with Claimant did not involve a third party in a civil suit for tort damages.⁶

Claimant testified that he did not use illegal drugs, did not smoke marijuana, and only occasionally drank a six-pack of beer on his boat at the time of trial. TR at 197-98. Claimant further testified that from September 2002 through September 2004, he had not gotten any kind of therapy, group therapy, or any type of psychological therapy. TR at 201.

Claimant also testified that friends haul fuel to his boat for him and maintain the bottom of his boat and that the rest of the boat goes without maintenance because Claimant is unable to do anything else. TR at 202. Claimant also testified that he likes to read and listen to talk radio on his boat. TR at 201-02.

Dr. Brodtkin examined Claimant on September 13, 2004 and found Claimant to have continuing ongoing respiratory symptoms consistent with ongoing airway reactivity, asthma, and wheezing. TR at 63. Dr. Brodtkin opined that Claimant needs maintenance therapy for his asthma involving a combination of long-acting bronchodilators to open the airways up and an inhaled steroid to minimize inflammation and then rescue therapy for when bronchospasm or closure of the airways occurs. TR at 63-64. Dr. Brodtkin further opined that in addition to these medications, the medications need management by a physician who is experienced or comfortable in treating respiratory illnesses. TR at 64.

Michael Deaver's Later Testimony

On October 20, 2004, Mr. Deaver attended his second deposition in litigation regarding Claimant's February 16, 2000 incident. EX 14; EX 15. At this second deposition, Mr. Deaver did not recall retrieving the bucket that Claimant left behind. EX 14 at 14.337. Mr. Deaver also testified that he did not even attempt to go all the way to the bottom of the tank because of the noticeable smell of chlorine bleach. EX 14 at 14.337-38. He also testified that when he went into the tank after Claimant was injured on February 16, 2000, Mr. Deaver did not notice any bilge water in the tank. EX 14 at 14.339. He later testified that the next day he noticed a little bit of bilge water in the tank. EX 14 at 14.340. Mr. Deaver described bilge water only as muddy and rusty water at the second deposition. EX 14 at 14.341.

At this later deposition, Mr. Deaver testified that the gallon jug of 12 percent industrial bleach found up on the deck outside the entry area the next day was the source of Claimant's problem on February 16, 2000. EX 14 at 14.338-39, 14.345-46. Mr. Deaver further testified that after going into the tank for about 25 to 35 seconds after Claimant was overcome by fumes or vapor, Mr. Deaver was not nauseated. EX 14 at 14.352. Mr. Deaver also testified that he thought Claimant developed a breathing problem from the incident on February 16, 2000 while working on the *Pribilof*. EX 14 at 14.356. Mr. Deaver states that his memory of the events of February

⁶ See *Redmond v. Sea Ray Boats*, 32 BRBS 1, 2 (1998)(BRB found error in application of Section 933(g) to bar a claim for benefits where state compensation claim was *not* brought against a third party in a civil suit for tort damages).

16, 2000 would have been clearer in 2002 at his first deposition than at his second deposition in October 2004. EX 14 at 14.344.

Vocational Evidence

Employer's witness, Merrill Cohen, MC, CRC, CCM, CDMS, a Vocational Rehabilitation counselor, testified that she had performed services for plaintiff counsel, employers, and insurance carriers and did not specialize in working for one side versus another. TR at 217-18; EX 12 at 12.298-300. Ms Cohen stated that in arriving at the opinions contained in her initial vocational assessment and labor market survey for Claimant dated January 5, 2005, she reviewed Claimant's employment records, an October 23, 2000 deposition transcript for Claimant, medical records from Harborview Medical Center and a psychiatric evaluation dated March 29, 2002 by Dr. Hamm. EX 5 at 5.64-94. In addition, Ms Cohen filed a supplemental vocational assessment and labor market survey for Claimant dated August 27, 2004. EX 11 at 11.269-97. Finally, Ms Cohen interviewed Claimant on December 17, 2003, and took into account his appearance, tattoos, felony record, and demeanor when interviewed. TR at 219-20, 224-25. Ms. Cohen conducted on-site market surveys between December 10 and 23, 2003 and between August 17 and 25, 2004 with several employers. TR at 221-22, 224-25; EX 5 at 5.68; EX 11 at 11.269.

Ms. Cohen found Claimant bright, literate, and he reported to her that he has excellent mathematical skills. EX 5 at 5.67. Ms. Cohen opined that Claimant had wage-earning capacity in various positions referenced in her labor market surveys. EX 5 and EX 11. Each position was located in the Bainbridge Island/Kitsap Peninsula and greater Seattle areas and were open at the time of Ms. Cohen's inquiry in December 2003 or August 2004. TR at 221-22, 225. Ms. Cohen opined that Claimant was capable of working various jobs including that of a *kitchen worker* at a rate of pay of \$7.16 per hour. (EX 11 at 11.283), *fast food cook*, at \$7.16 per hour (EX 11 at 11.275), *cashier* at a rate of pay of \$7.01-8.50 per hour (EX 5 at 5.87; EX 11 at 11.286-87, 11-293) *light assembly worker* at a rate of pay of \$8.45-10.30 per hour (EX 5 at 5.81), *fast food worker* at \$7.01 per hour (EX 5 at 5.70, 5.72, 5.74, 5.76), *production worker* at a rate of pay of \$8.00-9.50 per hour (EX 5 T 5.78), *dispatcher* at a rate of pay of \$7.01-9.00 per hour. (EX 5 at 5.80, 5.88; EX 11 at 11.290, 11.292), *dietary aide*, at \$7.16 per hour (EX 11 at 11.272), and *crew person* at \$7.16 per hour (EX 11 at 11.278).

Ms. Cohen opined that her analysis was consistent with the various evaluations of Claimant that she reviewed in that the positions were within the physical restrictions that Claimant's treating physician, Dr. Brodtkin, and the employer's psychiatric evaluator, Dr. Hamm, recommended for Claimant with each doctor's restrictions taken into consideration. TR 221. While Ms. Cohen spoke to the various employers about Claimant's physical restrictions and history of felony convictions, she did not speak to any of the potential employers about the psychotropic medication taken by Claimant or that he had a number of tattoos on his body as she did not consider these matters to be vocationally relevant given the restrictions imposed by Dr. Brodtkin and the medical opinion of Dr. Hamm as referenced above. TR at 225-28, 235-37.

With respect to Claimant's alleged psychological limitations, only Dr. Hamm opined that Claimant's psychiatric condition would not interfere with his ability to obtain gainful

employment of the type he worked at in February 2000, work Dr. Hamm described as being isolative or solitary jobs and not team oriented. TR at 258; *see also* EX 3 at 3.50. Dr. Hamm also opined that there could be problems with Claimant working a retail sales job due to his anger problems. TR at 257. Dr. Hamm also opined that Claimant's "666" tattoo on his hand distances him from people as "it does not show that you are friendly around people." TR at 261. Ms. Cohen did not consider Dr. Niems' restriction for Claimant against employment due to his psychiatric condition as of February 8, 2002. TR at 232-34.

Ms. Cohen concluded by finding that employers had positions open when she conducted her survey between December 10 and 23, 2003 and between August 17, and August 25, 2004 with several employers. TR at 221-22; EX 5 at 5.68; EX 11 at 11.269. Two of six companies had positions available during this period with wages ranging from \$7.00 to \$8.00 per hour. EX 28 at 223. With respect to Claimant's date of injury, Ms Cohen found that as of his February 2000 date of injury, wages ranged from \$6.50 to \$11.35 per hour in regard to the jobs found appropriate. TR at 222-23. None of the employers referenced in the second survey had any record of Claimant applying for any of the positions. TR at 222-23.

At trial, Claimant testified that he cannot do the work he used to do because he does not have the stamina. TR at 172. Claimant also testified that he has looked for jobs since the February 2000 incident and has telephoned fast food places in Seattle, Bainbridge Island, and Kitsap County asking for entry-level positions explaining to them his medical limitations and never denying that he had a prison record. TR at 155-56. He further testified that after explaining his medical limitations to these potential employers, they told him that they could not use him. TR at 156.

Claimant also testified that when he met with Ms. Cohen, he told her about his felony convictions, use of Paxil, and his anger problem. TR at 158. Dr. Brodtkin also testified that Claimant has an anger problem and takes Paxil for depression and, occasionally, Trazedone to help him sleep. TR at 68. Claimant also testified that he has been continuously taking Paxil every day for 2.5-3 years through trial TR at 197.

He further testified that a week or two before trial he called three of the employers referred to him by Ms. Cohen and some of them laughed at him because the one in Bainbridge knew him and from his appearance knew that Claimant is not a person who should be working with the public. TR at 158-59, 174-75.

Claimant also testified that his work with Labor Ready did not involve working with the general public and that two operations to Claimant's right ring finger left him with less than a full range of motion which would prevent him from working as an assembler of sophisticated fishing rods and reels working with others on detailed work. TR at 159 and 166. Claimant also testified that he earned approximately \$13,000-\$14,000 annually the last few years before the February 16, 2000 incident. TR at 200.

Dr. Brodtkin testified that he reviews all medical records in a case before determining whether a patient is able to perform job activities within medical restrictions. TR at 94-95. Dr. Brodtkin also discussed his methodology in determining whether a specific vocational job is

appropriate for an individual by looking for job activities that can reasonably be performed by an individual looking into the physical demands of the job. *Id.* Dr. Brodtkin found each one of Ms. Cohen's vocational jobs for Claimant problematic and he opined that he would not sign off or approve any of the jobs because they involved public contact or irritating fumes (assembler soldering). TR at 79-95. In addition, entry-level fast food jobs are inappropriate because they involve irritating fumes from grills, cleaning products or food handling which is inappropriate with Claimant's persistent phlegmy cough, and also due to Claimant's limited stamina since he cannot walk more than two level blocks without losing his breath. *Id.*

CONCLUSIONS OF LAW

Credibility

The following conclusions of law are based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon the analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In arriving at a decision in this matter, I am entitled to determine the credibility of witnesses, to weigh the evidence, and to draw my own inferences from it; furthermore, I am not bound to accept the opinion or theory of any particular medical expert. *See Banks v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968); *Todd v. Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988).

Claimant

I observed Claimant to be a very credible witness as to the facts and circumstances underlying the occurrence of his pulmonary injury on February 16, 2000. From time-to-time during the hearing, I observed Claimant coughing out of necessity. Specifically, I find it more likely than not that the combination of poor ventilation and some foreign substance, combined with Claimant's chlorox bleach cleaning solution, created a toxic gas cloud that overcame Claimant and required him to seek assistance and emergency care. I witnessed Claimant to be passionate and forthright with respect to his continuing symptoms from the February 16, 2000 incident and his inability to resume the isolated ship work that fit his antisocial personality well. After the February 16, 2000 incident, Claimant could no longer work with irritating fumes or cleaning chemicals, dusts or dirt. In addition, Claimant could not be expected to work with the public or in customer service and he did not possess the stamina to work a medium to heavy duty job. While I acknowledge that Claimant got into an occasional fight and had to row into shore, I do not find this inconsistent with his overall lack of stamina as no evidence of Claimant's prolonged exertion was put forth in this case.

Claimant was less credible as to his drinking and smoking habits but did not appear to abuse either in recent years as he apparently did in his younger years.

In addition, Claimant was believable with respect to the temporary depression he experienced due to the permanent respiratory problem caused by the February 16, 2000 incident. It is reasonable to believe that Claimant would be temporarily depressed for becoming dependent on a government welfare program rather than continue his isolated and nomadic work experience that had gotten him by since leaving the merchant marine business in the mid-90's.

After Claimant stopped seeing Dr. Horne, his work-related depression was under control as long as he continued his Paxil use. After that time Claimant was more irascible than depressed. At hearing, I witnessed Claimant's short temper and profane language outbursts and I had to admonish him more than once. TR at 180-82. This conduct verified my finding Claimant credible and was consistent with Drs. Horne, Hamm, and Neims's assessments of Claimant that he spent a lot of time isolated on his boat alone and he did not like to be around people very much. *See* TR at 249-50; EX 3 at 3.46.

Michael Deaver

Mr. Deaver was more credible at his first deposition on April 18, 2002 (CX 10) than he was at his second deposition on October 24, 2004 (EX 14). Whether it was the fact that Mr. Deaver's recollection of the specific events in February 2000 had faded by the time of the second deposition or he was motivated to reconstruct testimony more suitable to Employer at the second deposition, I find his testimony at the first deposition more credible and consistent with Claimant's recollection of the facts and circumstances occurring on February 16, 2000. Most telling was Mr. Deaver's recollection at the first deposition that 45 minutes after Claimant left the scene of being overcome by a toxic gas, Mr. Deaver entered the same tank and was nauseated and hurt by the smell. CX 10 at 670-71, 674-75, 683-84.

I specifically find and reject Mr. Deaver's testimony EX 14 at 14.335-41 to be not credible and inconsistent with his first deposition.

Dr. Brodtkin

Dr. Brodtkin's opinions regarding Claimant's psychiatric problems are accepted on a limited basis given his stated training through internal medicine to assess depression and manage depression as he is untrained as a psychiatrist or psychologist. *See* TR at 65-70; CX 3. Dr. Brodtkin is also qualified to take the opinions of various psychiatrists and psychologists into account when reaching medical conclusions. TR at 41, 65-66

Dr. Brodtkin is a board certified physician in Occupational and Environmental Medicine and Internal Medicine and a clinical associate professor at the University of Washington and has been on the faculty there over ten years, teaching environmental health and internal medicine and a substantial percentage of his work involves occupational medicine, specifically inhalation exposures. CX 3 and CX 6. As Claimant's treating physician, I found his testimony and demeanor very credible with substantial evidence to support his various opinions, diagnoses and criticisms of Dr. Burton's opinions and test results and the appropriateness of the jobs found by Ms. Cohen for Claimant.

Dr. Burton

Dr. Burton, while a toxicologist, is not a board-certified pulmonary specialist or internist. TR at 305-06; *see also* EX 9. I reject Dr. Burton's report (EX 2) and his testimony regarding causation of Claimant's respiratory problems given the flawed methodology of his methacholine challenge test. I agree with Dr. Brodtkin that the methacholine test administered to Claimant by Dr. Burton was invalid because there was nothing in the report to indicate that Dr. Burton told Claimant to stop using his respiratory medications of Albuterol, Seravent, and his steroid medication Flovent prior to taking the test. TR at 58-61, 76-78. Claimant indicated to Dr. Brodtkin that he did not discontinue medication prior to his testing with Dr. Burton. TR at 105-06, 154. Dr. Brodtkin testified that taking these medications can substantially lower the sensitivity of a methacholine test and by not stopping the medications at least 48 hours before testing, Dr. Burton violated the ATS protocol for performing methacholine tests. *Id.*, TR at 103-04. Even so, Dr. Brodtkin opined that the results of Dr. Burton's methacholine test even influenced by his respiratory medications show that Claimant received a borderline positive test result for respiratory impairment. TR at 77, 104. Dr. Brodtkin concluded by stating that in Dr. Burton's methacholine test, Claimant's FEV1 decreased 20 percent with 25 milligrams methacholine. TR at 108. Dr. Brodtkin further stated that ATS criteria say that a 16 to 25 percent decrease is a borderline response. *Id.*

I also did not find Dr. Burton's testimony credible for the reasons explained by Claimant's former treating physician, Dr. Brodtkin. For example, I agree and further find that Dr. Burton's opinions unfairly minimized Claimant's symptoms and his present respiratory illness and mischaracterized findings of other health care evaluations that Claimant received near the time of the February 2000 incident that noted significant respiratory symptoms. TR at 75-76, 129-30, 138-39. Furthermore, Dr. Brodtkin opined that on February 24, 2000, Claimant experienced significant symptoms of shortness of breath with exertion, had a new cough, and his lungs ached following a visible gas exposure of eight to ten minutes. TR at 129. In addition, Dr. Brodtkin opined that the ambulance records from February 16, 2000 reflect Claimant with chest discomfort and a respiratory difficulty further described as a rapid respiratory rate also considered significant by Dr. Brodtkin. TR at 130. Dr. Brodtkin continued to opine that he agreed with Dr. Burton's observation of Claimant's active wheezing and Claimant's respiratory medications at that time. *Id.*

I also reject Dr. Burton's opinion that Claimant's COPD and not his RADS explain Claimant's current respiratory problems. I find more credible Dr. Brodtkin's opinion that COPD is a much broader term than RADS and is typically found with emphysema and chronic bronchitis which most commonly are smoking related conditions. TR at 72. Dr. Brodtkin further opined that COPD is a condition that develops over years and years of exposure and is typically not a condition that develops within minutes from a traumatic event. *Id.* While Dr. Brodtkin believed that Claimant likely has mild, early COPD based on the CAT scan findings of early emphysema in the spring of 2001, he did not think Claimant's COPD had anything to do with Claimant's RADS respiratory condition. TR at 71, 79. Dr. Brodtkin further testified that Claimant would not have been able to work up to February 16, 2000 in his active and heavy labor work with COPD and he would have had a lot of trouble working with bleach on February 14 and 15, 2000 if he had COPD. *Id.*

Finally, Dr. Burton's opinions regarding Claimant's psychiatric problems are rejected as he is unqualified as a psychiatrist or psychologist. *See* EX 9.

Dr. Horne

I find former treating psychiatrist Dr. Horne's medical records reliable for the limited period covered (May 2000 – April 20, 2001) and supportive of Claimant's temporary post-traumatic stress syndrome or depression secondary to the February 16, 2000 incident and Claimant's resulting permanent respiratory condition. Moreover, Dr. Horne had the longitudinal therapy history with Claimant to best understand and opine about his mental condition. While Dr. Horne does not specifically state that Claimant's mental condition from February 16, 2000 through April 20, 2001 prohibits or restricts him from working, I find that Dr. Horne's "To Whom It May Concern" letter letters in September and December 2000 (CX 2 at 288-89) should have reasonably alerted any employer that Claimant was unable to work while recovering from post-traumatic stress disorder and major depression.

Dr. Hamm

I found Dr. Hamm to be a believable witness on a limited basis as to Claimant's pre-existing and ongoing chronic mild to moderate impairment in his social functioning due to his personality disorder and chronic mood instability and chemical abuse problems. EX 3 at 3.49. Because Dr. Hamm opined that Claimant has had anti-social or social problems with anger his whole life and has also managed his anti-social problems in the past "by just being in situations where he doesn't have to deal with a lot of people" (TR at 251), I find that Dr. Hamm's opinions are consistent with my holding that Claimant's respiratory condition prevents him from the limited gainful employment suitable to his personality such as those past situations where Claimant did not have to deal with a lot of people in the course of his heavy duty manual labor jobs.

Dr. Hamm also recommended that Claimant abstain from alcohol and marijuana, continue regular use of Paxil, and work "within a social environment that is tolerable to him [Claimant]." TR at 252. I reject Dr. Hamm's general statement that Claimant's mental health condition does not prevent him from gainful employment because it is inconsistent with his specific findings that Claimant is best suited for situations which are tolerable to Claimant (i.e. situations where Claimant can work alone) and are limited to situations where he doesn't have to deal with a lot of people. I also find Dr. Hamm's testimony that Dr. Neims did not opine that Claimant cannot work due to psychiatric conditions as non-credible. *See* TR 253. Instead, Dr. Neims specifically stated that it would likely be difficult for Claimant to work cooperatively with coworkers and employers and may evidence aggressive behavior relative to real or perceived criticism. CX 2 at 320-21.

Finally, only Dr. Hamm testified that there was a note in Dr. Horne's records indicating that Claimant had stopped his respiratory medications before seeing Dr. Burton. TR at 254, 263-64. Dr. Horne's records submitted at trial did not extend, however, to February 2002 or thereafter, and there was no evidence that Claimant was treated by Dr. Horne in or after 2002

other than this unsubstantiated comment by Dr. Hamm. I reject Dr. Hamm's testimony that Claimant had stopped his respiratory medications before Dr. Burton's methylcholine challenge test as unsubstantiated and outweighed by Claimant's testimony that he did not stop the medications and the absence of any documentary evidence that Claimant was instructed to stop his medications by Dr. Burton.

Dr. Neims

Dr. Neims's report was submitted later than 30 days before trial and his qualifications are not included in the record and, therefore, his opinions get limited secondary weight as supporting evidence. While not a psychologist, Dr. Brodtkin is correct to state that Dr. Neims's psychological evaluation report for Claimant did not discuss causation in association with Claimant's alleged inability to re-obtain sustained gainful employment on the one hand and the February 16, 2000 incident on the other. *See* CX 2 at 316-21; CX 6 at 481-82. I find that Dr. Neims's report does not contain any credible opinion from Dr. Neims on causation or that Claimant's psychological condition as of February 8, 2002 was work-related in any way.

I do find Dr. Neims credible as to his finding that Claimant's mental condition in combination with his respiratory problem "will leave it very difficult for him [Claimant] to re-obtain sustained gainful employment." CX 2 at 321. This opinion is consistent with those of Dr. Horne, Dr. Brodtkin, and Dr. Hamm as to the positions offered by Ms. Cohen.

Causation

If a claimant sustains an injury at work which is followed by a subsequent injury or aggravation outside work, the employer is liable for the entire disability and for medical expenses due to both injuries if the subsequent injury is the natural consequence or unavoidable result of the original work injury. *Lewis v. Norfolk Shipbuilding and Dry Dock Co.*, 20 BRBS 127 (1987); *Pakech v. Atlantic & Gulf Stevedores, Inc.*, 12 BRBS 47 (1980). Claimant contends that his respiratory condition was caused by his work-related exposure to chlorine bleach or some other toxic substance on February 16, 2000 aboard Employer's vessel. Claimant also claims that his psychological condition, diagnosed as post-traumatic stress syndrome and significant depression, was the natural consequence or the unavoidable result of the respiratory condition that prevented Claimant from returning to the limited gainful employment he could handle. In contrast, Employer contends that neither Claimant's respiratory problems nor his depression were caused or aggravated by his work activities or by his recovery from the respiratory problem. In the alternative, Employer contends that Claimant's smoking cigarettes, cigars and/or marijuana smoking was an intervening cause of Claimant's continuing respiratory problems severing its liability for the respiratory problems.

Section 20(a) Presumption Has Been Invoked For Both of Claimant's Conditions

Claimant's Respiratory Condition

In determining whether an injury is work-related, the Claimant is aided by the Section 20(a) presumption if he can establish a prima facie case; i.e. that he suffered a harm and conditions existed or a work accident occurred which could have caused the harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 6312 (1982); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998). Under *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990), Claimant need not prove the pre-requisites by a preponderance of the evidence but need only show "some evidence tending to establish" those pre-requisites.

On February 16, 2000, after working several hours within the tank, Claimant testified about an incident where the vessel shifted, thereby causing waste water and other fluids within the vessel to shift and combine with his chlorine bleach cleaning solution inside the tank where he was working. TR at 186, 194; CX 1 at 29-30, 35; EX 2 at 2.23. A bilge-type solution, containing chlorine and other unknown waste materials, came inside the tank, creating a cloud-like accumulation that appeared as a fog inside the tank. TR at 190, 194, 271. Anywhere from about 1 to 60 gallons of this bilge water came into the tank and Claimant immediately became aware of a stronger chlorine taste in his mouth. TR at 160, 186, 190, 194; CX 1 at 30 and 280; EX 1 at 1.4; EX 2 at 2.23.

At this time, the ventilation fans were removed and Claimant was almost finished with his job on February 16, 2000. The removal of the fans combined with the chlorine fumes that were present led to his becoming disoriented and overcome by the fumes. CX 1 at 280. Claimant also experienced burning eyes, skin, nose, and throat, a strong smell of chlorine, and began to feel light-headed. TR at 160, 186, 194; CX 1 at 30; EX 1 at 1.4; EX 2 at 2.23.

Mr. Deaver also confirmed that there was much ammonia three stories up on the boat the day of the incident and that ammonia reacts "nastily" when mixed with chlorine or Chlorox bleach. CX 10 at 656.

Mr. Deaver also testified that if the boat shifted, bilge water, comprised of oily water, soapy water, condensates from air compressors, and other "stuff that comes off engines" and creates a film that sits on top of water. This mixture could seep into the tank that Claimant had been cleaning so he recommended that rags be used to build a coffer dam to keep the bilge water out. CX 10 at 669-72; EX 14 at 14.314-323. It is unknown whether these rags were present to act as a coffer dam on February 16, 2000.

Mr. Deaver further described the condition in the tank forty-five minutes after Claimant came out as causing him to feel nauseated as he was trying to find the source of Claimant's problem. CX 10 at 674 and 684. Mr. Deaver concluded this line of testimony at his first deposition by stating that it was still so bad after forty-five minutes and going all the way down

in the tank that it hurt his lungs to breathe in the tank and that while briefly in the tank, he felt the chlorine in his nose. CX 10 at 675 and 683.

Dr. Morris also opined as of March 1, 2000 that Claimant had a fairly significant chlorine exposure which likely caused Claimant irritation which explained his symptoms. CX 1 at 32 Dr. Brodtkin further opined that Claimant's irritant conjunctivitis was caused by Claimant being exposed to very prominent irritants on February 16, 2000, in an unusual exposure condition of an enclosed water tank while working with a bleach solution that mixed with a bilge fluid that contained various components of cleansers and caused a very prominent irritant reaction that was quite consistent with a chlorine gas exposure in an enclosed space. TR at 50-53; CX 6 at 483.

Dr. Brodtkin further testified that regardless of the total volume of bilge water, even one gallon mixed with a chlorine bleach cleaning solution could have caused a chlorine reaction and fog described by Claimant as having occurred on February 16, 2000. TR at 142. Dr. Brodtkin further opined that Claimant's clinical symptoms changed dramatically on February 16, 2000 and the days following that he believed that Claimant's dramatic reaction was indicative of an irritant gas exposure that was beyond that of sodium hypochlorite or bleach in a solution. TR at 121. Dr. Brodtkin diagnosed Claimant with residual irritant bronchitis or RADS either of which he opined was considered work related on a more probable than not basis. TR at 54-55; CX 1 at 13. Dr. Brodtkin also testified that he diagnosed Claimant with RADS and specifically causally connects it with Claimant's exposure in the fresh water tank on February 16, 2000 "to a high degree of medical certainty." CX 6 at 506-07.

The evidence establishes that Claimant was exposed to conditions which caused his RADS respiratory problem while employed with Employer. Claimant was employed with Employer on February 16, 2000 and testified that he was exposed to a white cloud of gas that caused him distress in his lungs requiring at least two trips to emergency rooms and continued follow-up examinations by his treating physician, Dr. Brodtkin. According to Dr. Brodtkin, Claimant developed RADS after exposure to chlorine bleach on February 16, 2000 at Employer.

I find that Claimant suffers from RADS, thereby establishing that he suffered a harm. Medical reports from Dr. Brodtkin starting in March 2000, support establishment of the section 20(a) presumption. Moreover, Claimant asserts that his respiratory problems grew progressively worse after his exposure to some toxic gas, most likely chlorine, on February 16, 2000

This is enough to support a prima facie showing and invoke the Section 20(a) presumption.

Claimant's Depression

On September 15, 2000 and again on December 29, 2000, Dr. Horne wrote a "To Whom It May Concern" letter regarding Claimant and wrote that when Claimant was first referred to him in early 2000, he suffered from Post Traumatic Stress Syndrome and a Major Depressive Disorder secondary to the psychological effects of his chemical inhalation. CX 1 at 181; CX 2 at 288-89. Dr. Horne further wrote that Claimant was taking Paxil 40 mg. and having weekly psychotherapy and that Claimant had made some improvement but continued to have significant

symptoms of depression, which Dr. Horne believed were caused by the lifestyle change Claimant had had to make because he could not perform the same work tasks as prior to the February 16, 2000 incident and the delay in settling his insurance claims. *Id.* Dr. Horne concluded the letter by stating that he would anticipate that Claimant would need treatment at the above-referenced level for six more months. *Id.*

Claimant also testified that he was depressed after the February 16, 2000 incident because his ongoing respiratory problems prevented him from working the manual labor positions on ships as he had done throughout his long work career. TR at 168-69.

The evidence establishes that Claimant had developed post-traumatic stress disorder and major depression as a natural consequence of his work-related exposure to chlorine gas on February 16, 2000 while employed with Employer. According to Dr. Horne, Claimant developed post-traumatic stress disorder and major depression secondary to RADS.

I find that Claimant suffered from post-traumatic stress disorder and major depression as a direct consequence to his chemical inhalation, thereby establishing that he suffered a harm. Medical reports from Dr. Horne starting in May 2000, support establishment of the section 20(a) presumption.

This is enough to support a prima facie showing and invoke the Section 20(a) presumption.

Employer Has Rebutted Section 20(a) Presumption With Regard To Claimant's Respiratory and Depression Conditions

Once a claimant has invoked the presumption, the burden shifts to the employer to rebut it with substantial countervailing evidence. *Peterson v. General Dynamics Corp.*, 25 BRBS 14 (CRT) (2d Cir. 1992), cert. denied, 507 U.S. 909 (1993); *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45, 46-47 (1996). When a doctor's testimony and reports unequivocally state his opinion, rendered within a reasonable degree of medical certainty that the claimant's condition is not work-related, employer has produced evidence sufficient to sever the causal relationship between claimant's employment and his harm. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39, 41 (2000). The doctor does not need to "rule out" all other causes or give his opinion with "absolute certainty." *Id.* at 42.

Claimant's Respiratory Condition

Employer relies primarily upon the medical testimony of Dr. Burton to rebut Claimant's claims that his respiratory problems were caused by his chemical inhalation on February 16, 2000. Dr. Burton testified that instead of work-related exposure to chlorine gas, Claimant's lifelong smoking has caused him to develop a mild form of COPD and not RADS.

Specifically, Dr. Burton opined that any diagnosis of RADS was erroneous because the exposure was insignificant and that, instead, Claimant has mild COPD, the sole result of Claimant's long-term cigarette smoking habit and continuing exposure to the products of

combustion from consumption of cigars and his own rolled cigarettes as documented by a high-resolution chest CT scan. TR at 272-73285-89, 296-97; EX 2 at 2.33-35. Dr. Burton stated that as further evidence that Claimant did not have RADS, Claimant did not describe severe coughing paroxysms with chest pain, shortness of breath, severe ocular and upper airway irritant symptoms that would indicate a significant exposure to hypochlorite solution or any other irritant substance as a required precursor to RADS. TR at 276-77; EX 2 at 2.34. Dr. Burton also stated that Claimant did not express the necessary symptoms and did not have the required clinical course, physical findings, pulmonary function studies, or radiographic data to document a RADS condition. TR at 278-89; EX 2 at 2.35.

As stated above, I have rejected Dr. Burton's opinions due to his invalid methacholine challenge test procedure. I find, however, that Dr. Burton's testimony and medical records are adequate to rebut the Section 20(a) presumption as it relates to Claimant's alleged respiratory condition being caused or aggravated by Claimant's work activities.

Claimant's Depression

Regarding whether the work activities caused or aggravated Claimant's depression, Dr. Hamm testified that he could state to a reasonable degree of medical certainty, that Claimant's work activities with Employer did not *cause* his depression as it pre-existed the February 16, 2000 incident. However, this does not rebut whether the work activities *aggravated or accelerated* Claimant's depression. Under the "aggravation rule," an employer is liable for the claimant's entire resulting disability when an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517, 18 BRBS 45 (CRT) (5th Cir. 1986) (en banc).

Dr. Hamm also administered the two psychological tests referenced above to Claimant and found Claimant with "chronically mild to moderate impairment in his social functioning due to his personality disorder and chronic mood instability and chemical abuse problems." EX 3 at 3.49. Dr. Hamm further found Claimant to be functioning at a level compatible with his pre-injury or pre-February 16, 2000 level of functioning and capable of gainful employment. *Id.*

Dr. Hamm further opined that the February 16, 2000 incident had neither caused nor permanently aggravated Claimant's mental health condition and that Claimant's mental health condition did not prevent him from gainful employment. EX 3 at 3.50. Dr. Hamm concluded by opining that even though Claimant did have mental health problems, these personality problems, however, were "chronic and probably pre-existed his 2-16-00 injury." TR at 251; EX 3 at 3.50.

I find that Dr. Hamm's testimony and medical records are adequate to rebut the Section 20(a) presumption as it relates to depression being caused or aggravated by Claimant's work activities.

Weighing the Evidence With Respect To Claimant's Two Claims

Since the Employer has successfully rebutted the Section 20(a) presumption of causation with respect to Claimant's two claims, the factual question of causation "must be resolved upon

the whole body of proof pro and con.” *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87, 56 S. Ct. 190, 193 (1935). I will first address whether Claimant’s activities while employed with Employer caused his ongoing respiratory condition.

Claimant’s Respiratory Problem

Dr. Brodtkin’s opinions, as Claimant’s treating physician, are entitled to special weight because a treating physician is employed to cure and has a greater opportunity to know and observe the patient as an individual. *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998), amended, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), cert. denied, 528 U.S. 809 (1999). In addition, a treating physician is generally paid to cure a patient and not to issue a particular opinion as a consultant in litigation. Dr. Brodtkin was more believable than Dr. Burton and he also reasonably refuted Dr. Burton’s opinions.

Dr. Brodtkin testified that he reviewed Dr. Burton’s report (EX 2) and took exception to a number of things in the report. TR at 75-76. For example, Dr. Brodtkin opined that Dr. Burton’s report unfairly minimized Claimant’s symptoms and his present respiratory illness and mischaracterized findings of other health care evaluations that Claimant received near the time of the February 2000 incident that noted significant respiratory symptoms. TR at 75-76, 129-30, 138-39. For example, Dr. Brodtkin opined that on February 24, 2000, Claimant experienced significant symptoms of shortness of breath with exertion, had a new cough, and his lungs ached following a visible gas exposure of eight to ten minutes. TR at 129. In addition, Dr. Brodtkin opined that the ambulance records from February 16, 2000 reflect Claimant with chest discomfort and respiratory difficulty involving a rapid respiratory rate also considered significant by Dr. Brodtkin. TR at 130. Dr. Brodtkin continued to opine that he agreed with Dr. Burton’s observation of Claimant’s active wheezing and Claimant’s respiratory medications at that time. *Id.*

Dr. Brodtkin, however, opined that the methacholine test administered to Claimant by Dr. Burton was invalid because there was nothing in the report to indicate that Dr. Burton told Claimant to stop using his respiratory medications of Albuterol, Seravent, and his steroid medication Flovent prior to taking the test. TR at 58-61, 76-78. Claimant indicated to Dr. Brodtkin that he did not discontinue medication prior to his testing with Dr. Burton. TR at 105-06, 154. Dr. Brodtkin testified that taking these medications can substantially lower the sensitivity of a methacholine test and by not stopping the medications at least 48 hours before testing, Dr. Burton violated the ATS protocol for performing methacholine tests. *Id.*, TR at 103-04. Even so, Dr. Brodtkin opined that the results of Dr. Burton’s methacholine test even influenced by his respiratory medications show that Claimant received a borderline positive test result for respiratory impairment. TR at 77, 104. Dr. Brodtkin concluded by stating that in Dr. Burton’s methacholine test, Claimant’s FEV1 decreased 20 percent with 25 milligrams methacholine. TR at 108. Dr. Brodtkin further stated that ATS criteria say that a 16 to 25 percent decrease is a borderline response. *Id.*

Dr. Brodtkin also testified that COPD is a much broader term than RADS and is typically found with emphysema and chronic bronchitis which most commonly are smoking related conditions. TR at 72. Dr. Brodtkin further opined that COPD is a condition that develops over

years and years of exposure and is typically not a condition that develops within minutes from a traumatic event. *Id.* While Dr. Brodtkin believed that Claimant likely has mild, early COPD based on the CAT scan findings of early emphysema in the spring of 2001, he did not think Claimant's COPD had anything to do with Claimant's RADS respiratory condition. TR at 71, 79. Dr. Brodtkin further testified that Claimant would not have been able to work up to February 16, 2000 in his active and heavy labor work with COPD and he would have had a lot of trouble working with bleach on February 14 and 15, 2000 if he had COPD. *Id.*

As a result, I find that Dr. Brodtkin's opinions as Claimant's treating physician that Claimant developed RADS from his work-related inhalation of chlorine gas outweigh the opinions put forth by Employer's expert, Dr. Burton, particularly given Dr. Burton's flawed administering of the methyl chloro challenge test to Claimant. I find that Claimant suffered a work-related respiratory disability on February 16, 2000 that is continuing.

Claimant's Depression

Dr. Horne's opinions, also as Claimant's former treating psychiatrist, are entitled to special weight for the same reasons as Dr. Brodtkin's opinions are given special weight. From May 2000 through at least April 20, 2001, Dr. Horne developed the longitudinal therapy history with Claimant to warrant special weight for his opinions. In addition, Dr. Horne was likely paid to cure Claimant's mental problems, if possible, and not to issue a particular opinion as a consultant in litigation. It is entirely reasonable to believe Dr. Horne when he opined that Claimant's mental condition was caused by the lifestyle change Claimant had had to make and the delay in settling his insurance claims. CX 1 at 181.

In contrast, Dr. Hamm did not treat Claimant during the time from May 2000 through April 20, 2001 when Dr. Horne saw Claimant numerous times as his treating psychiatrist. Instead, Dr. Hamm met with Claimant just once on March 29, 2002 as requested by Employer. As a result, I reject Dr. Hamm's opinions as to the cause of Claimant's mental condition as it existed from February 16, 2000 to April 20, 2001 as it is in conflict with treating psychiatrist Dr. Horne and Dr. Hamm did not personally observe Claimant during this critical time period. I further find that because of his role as treating psychiatrist, Dr. Horne was more qualified than Dr. Hamm to opine that Claimant developed or aggravated a post-traumatic stress disorder and major depression as a result of his work-related chemical inhalation on February 16, 2000 and the great life changes that Claimant experienced as a direct consequence thereto.

Moreover, Dr. Hamm's opinions as to Claimant's mental condition on March 29, 2002 do not invalidate Dr. Horne's medical reports and the opinions contained therein. As referenced above, I find that Dr. Hamm's opinions are consistent with Dr. Horne and Dr. Neims's opinions at least from the point of time that Dr. Hamm saw Claimant in March 2002.

After considering all of the evidence, I find that the record is sufficient to support a finding that Claimant's depression was temporarily aggravated by his traumatic toxic gas inhalation on February 16, 2000 while performing employment activities and his subsequent realization that he could no longer perform the same isolated and independent manual labor jobs he had performed for much of his work career.

No Intervening Cause

Employer contends that even if it is found liable for Claimant's RADS respiratory condition that Claimant's non-employment activities, including cigarette, cigar, and marijuana smoking worsened Claimant's respiratory condition, thereby severing any liability that they may have had.

The BRB has said that "treatment is compensable even though it is due only partly for a work-related condition." *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 258 (1984). It is necessary that the employee show that the injury arose only in part from the employment to be compensable. *Brown v. District of Columbia Dept. of Employment Services*, 700 A.2d 787, 792 (D.C.App.,1997)(citations omitted).

The law of intervening causes asks whether the disability is causally related to, and is the natural and unavoidable consequence of, the claimant's work-related accident or whether the subsequent incident constituted an independent and intervening event attributable to the claimant's own intentional conduct, thus breaking the chain of causality between the work-related injury and any disability the employee may be experiencing. *See Hayward v. Parsons Hospital*, 32 A.D.2d 983, 301 N.Y.S.2d 659 (N.Y. 1969). The subsequent disability is still compensable even if the triggering episode is some non-employment exertion like raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in and of itself would not be unreasonable in the circumstances. *Id.*

Only Dr. Burton testified that Claimant's smoking and not the February 16, 2000 incident was an intervening cause of Claimant's respiratory condition. As referenced above, Dr. Brodtkin knew of Claimant's reduced smoking habits and while he preferred that Claimant completely stop smoking, Claimant's smoking did not alter Dr. Brodtkin's opinion that the February 16, 2000 incident caused Claimant's RADS and his subsequent smoking was not an intervening cause although smoking was likely responsible for Claimant's mild COPD condition. Specifically, while Dr. Brodtkin believed that Claimant likely has mild, early COPD based on the CAT scan findings of early emphysema in the spring of 2001, he did not think Claimant's COPD had anything to do with Claimant's RADS respiratory condition. TR at 71, 79; CX 6 at 502-03, 51112, 514-16. I find Dr. Brodtkin's testimony believable and reasonable in light of the objective evidence.

Other than Dr. Burton, whose opinion I rejected in the preceding paragraphs, there was no testimony that any of Claimant's activities were likely independent causes of his respiratory condition. As a result, I find that there is insufficient evidence to find that Claimant's smoking was an independent cause of the Claimant's respiratory condition, so as to sever the Employer's liability for the respiratory condition and medical benefits.

Nature and Extent of Disability

A disability is the “incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or other employment.” 33 U.S.C. § 902(10). Compensation for an industrial injury depends on the nature and extent of the disability, both of which must be established by the claimant. 33 U.S.C. § 908(c)(21); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985). When evaluating a disability, I will consider the claimant’s age, education, and employment history, as well as the availability of appropriate employment. *American Mut. Ins. Co. v. Jones*, 426 F.2d 1263, 1265 (D.C. Cir. 1970).

Nature of Disability

A disability is permanent if the claimant has any residual impairment after reaching maximum medical improvement or if the disability has persisted for a lengthy period of time and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedores Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Trask*, 17 BRBS at 60.

Claimant’s Respiratory Condition

In the instant case, Claimant’s respiratory problem began immediately after the February 16, 2000 incident and continued thereafter. Despite numerous examinations with his treating physician, Dr. Brodtkin, Claimant required respiratory medications and continued to complain of persistent cough, lack of stamina, and related breathing problems. The parties as well as Dr. Brodtkin each agree that Claimant’s respiratory condition has reached a permanent and stationary status, and would impose upon Claimant permanent work restrictions. Stip. Fact No. 7; CX 1 at 9,10,12,39-40, 77-78. Accordingly, because Claimant’s respiratory condition has persisted so long and has not changed, I conclude that his condition is permanent.

The parties have stipulated that Claimant’s physical respiratory problem reached maximum medical improvement in April 2001. Stip. Fact No. 7. More specifically, I find that Claimant reached maximum medical improvement as to his respiratory problem on April 17, 2001 when Dr. Brodtkin opined that he considered Claimant’s respiratory condition stable. CX 1 at 77. Claimant “had reached a fixed and stable status with ongoing asthma, RADS, and that this was likely after a year to be a persistent condition.” TR at 62-63, 114. Dr. Brodtkin further opined that it was more probable than not that Claimant’s respiratory condition was permanent. TR at 62. Dr. Brodtkin also rated Claimant using the American Medical Association (“AMA”) Guidelines for Permanent Impairment for Asthma and estimated Claimant’s whole person impairment at 50% based on Claimant’s symptoms and pulmonary test results. CX 1 at 40. Dr. Brodtkin opined that Claimant should strictly avoid work with any significant exposure to irritating dust, fumes, vapors, or anything more than light duty. *Id.* Finally, Dr. Brodtkin made no assessment about any noted depression and considered Claimant’s respiratory condition stable enough to postpone any further examinations for four months. CX 1 at 77.

At that time, Dr. Brodtkin found Claimant to continue to have active bronchitic symptoms and symptoms consistent with airway hyperreactivity. CX 1 at 15. Dr. Brodtkin found that Claimant continued to have trouble with cold and exertion and that Claimant's overall condition remained relatively stable and symptomatic. *Id.* Given these unchanged symptoms and the length of time since the February 16, 2000 incident, Dr. Brodtkin considered it highly unlikely that Claimant would experience resolution of this condition. *Id.* Dr. Brodtkin further opined that Claimant could not return to his work as a merchant marine sailor or laborer and confirmed that Claimant's only ability to work included light duty work with no exposure to irritating dust, fumes, or vapors which is not compatible with his prior work activities and training. *Id.* Dr. Brodtkin planned for Claimant to obtain a full pulmonary function testing to assess the level of impairment one year following irritant exposure to chlorine. *Id.*

Relying on Dr. Brodtkin's opinions, I find that Claimant was temporarily disabled from February 16, 2000 to April 17, 2000 when his respiratory disability became permanent.

Claimant's Depression

Claimant and Employer dispute, however, when, and if, Claimant's psychological condition reached maximum medical improvement. Claimant argues that, according to Dr. Neims's opinion, it would be very difficult for Claimant to re-obtain sustained gainful employment. *See* CX 2 at 321. Employer contends that Claimant's psychological condition, if any, is unrelated to the February 16, 2000 incident as Claimant's psychological problems pre-date the February 16, 2000 incident and were not aggravated by the incident.

As discussed above, I have previously found that Claimant's pre-existing depression was aggravated by the February 16, 2000 incident and follow, instead, Dr. Horne who opined that Claimant suffered post-traumatic stress disorder and major depression secondary from the February 16, 2000 chemical inhalation through April 20, 2002 when Claimant's work-related mental disability had become controlled and resolved. Specifically, on April 20, 2001, Dr. Horne noted that Claimant's depression was much improved and opined that Claimant could lower his dosage of Paxil with no return of symptoms with the overall plan to slowly discontinue Claimant's antidepressant medication. EX 3 at 3.41. Dr. Horne opined that Claimant's aggravated depression had resolved, making any further psychotherapy sessions unnecessary. *Id.*

As further evidence that Claimant's aggravated depression had resolved, Dr. Hamm further found Claimant in March 2002, to be "functioning at a level compatible with his pre-injury or pre-2-16-00 level of functioning" and capable of gainful employment. EX 3 at 3.49.

I further find that based on Dr. Horne's opinions and medical records Claimant reached maximum medical improvement and resolved his post-traumatic stress disorder and aggravated major depression on April 20, 2001. Finally, I find that while Claimant's personality disorders described best by Drs. Hamm and Neims pre-existed the February 16, 2000 incident and remained after Claimant's aggravated work-related mental conditions resolved, any episodes of depression and major anxiety Claimant suffered after April 20, 2001 were due to his failure to maintain regular treatment with Paxil combined with his drinking and marijuana use.

Accordingly, in the absence of persuasive countervailing evidence and based on the record as a whole, I find and conclude that Claimant's aggravated work-related mental condition rendered him temporarily and totally disabled from February 16, 2000 until it resolved as of April 20, 2001, the date on which Dr. Horne met with Claimant and rendered his opinion.

Extent of Disability

Under the Act, a claimant is presumed to be totally disabled where the claimant establishes an inability to return to the claimant's usual employment. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989); *Elliot v. C & P Tel. Co.*, 16 BRBS 89, 91 (1984). If the claimant invokes this presumption, the burden shifts to employer to establish the availability of suitable alternate employment that the claimant is capable of performing. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). To meet this burden, the employer must identify specific positions which are realistically available to the claimant and comport with the claimant's physical restrictions. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988); *Bumble Bee Seafoods*, 629 F.2d at 1330. Even if the employer succeeds at establishing suitable alternate employment, the claimant may still prevail by showing an inability to secure employment despite a diligent effort. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991).

I find that Claimant is unable to perform his pre-injury regular job duties as a medium to heavy duty ship laborer. Dr. Brodtkin has convincingly and consistently opined that Claimant's continuing symptoms of having trouble with cold and exertion combined with his persistent phlegmy cough make it highly unlikely that Claimant would experience resolution of his RADS. CX 1 at 15. Dr. Brodtkin further opined that Claimant could not return to his work as a merchant marine sailor or laborer and confirmed that Claimant's only ability to work included light duty work with no exposure to irritating dust, fumes, or vapors which is not compatible with his prior work activities and training. *Id.* As a result, I find that Claimant is unable to perform his usual limited medium to heavy duty manual labor ship work due to his work related injuries, and accordingly, I conclude that Claimant is entitled to a presumption of total disability from February 16, 2000 and continuing.

To rebut the presumption of total disability, the employer must present evidence of suitable alternate employment that claimant is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). To meet this burden, the employer must show the availability of job opportunities within the geographical area in which the claimant resides, which he can perform given his age, education, work experience and physical restrictions, and for which the claimant can compete and reasonably secure. *Id.* at 1042-43; *Bumble Bee Seafoods*, 629 F.2d at 1330; *Hansen v. Container Stevedoring Co.*, 31 BRBS 155, 159 n.5 (1997). In determining this issue, I may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable employment. *See Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). The counselors must identify specific available jobs; labor market surveys are not enough to establish suitable alternate employment. *See Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380 (1983).

Employer asserts that nine positions as identified by Ms. Cohen were available to Claimant. EX 5 and EX 11. One of the positions was that of a “cashier.” Initially, with respect to the jobs identified by Ms. Cohen, I am unconvinced that the “cashier” position was realistically “available” to Claimant, as his pre-injury criminal record is relevant in determining if jobs are realistically available to a claimant. *See Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988), *rev’g* 19 BRBS 6 (1986). In *Hairston*, the Ninth Circuit reaffirmed the ALJ’s finding that a bank guard position was not realistically “available” to Claimant Hairston because of his pre-injury criminal record for shop-lifting. *Hairston*, 849 F.2d at 1196. In the instant case, Ms. Cohen testified that she took into consideration Claimant’s prior convictions and sentencing for forgery in 1966 in Los Angeles, California, robbery in 1967 in Columbia, New York, theft in 1975 in Jackson County, Oregon, unlawful possession of a firearm in 1980 in Northhampton, Massachusetts, and possession of a sawed-shotgun in 1984 in Easley, South Carolina. TR at 219-20, 224-25; EX 6 at 6.109-10. Ms. Cohen also testified that only employers involved in her second labor market survey on August 27, 2004 were asked whether or not a felony or history of felony convictions would preclude them from hiring a person. TR at 226. Because Claimant’s criminal record was incurred well before his February 16, 2000 injury, I find that it can have a disqualifying effect on his ability to secure alternative employment. Moreover, I find that the “cashier” position Ms. Cohen identified in her second labor market survey would not be appropriate for Claimant given his pre-injury felony conviction for robbery and theft because of the cash-handling involved with that position.

In addition, I further find that Claimant’s criminal record is a limitation that should have been taken into consideration like a limitation of education and literacy when Ms. Cohen contacted potential employers. As such, I also find that Employer has failed to sustain its burden of proof as to the availability of alternative employment with respect to the “assembler,” “dispatcher,” “cashier” and “production worker” positions listed in the first labor survey because none of the employers were asked by Ms. Cohen whether Claimant’s criminal record would preclude them from hiring Claimant. See TR at 226.

As to the remaining categories of work---kitchen worker, fast food cook, fast food worker, crew person, and dietary aide---Ms. Cohen testified that with the exception of one employer, the employers contacted in the second labor market survey said that a criminal record would not automatically preclude employment. TR at 226. Ms. Cohen further testified that the fast food positions listings downloaded from McDonalds stated that a felony conviction will not necessarily preclude one from employment. *Id.* At most, Ms. Cohen researched whether a felony conviction “would be a problem,” and concluded that it was not a problem for all but one of the employers in her second labor market TR at 225-227. I find this testimony unpersuasive in establishing that Claimant’s prior felony convictions would not disqualify him from consideration for the positions Ms. Cohen identified. Employer offers no specific evidence as to which potential employer and for what position Claimant’s criminal record would be acceptable. As a result, I find that those remaining positions identified by Ms. Cohen in her second labor market survey were not realistically “available” to Claimant given the potential disqualifying effect of his extensive criminal record.

Alternatively, if I were to ignore Claimant's extensive criminal record, I still find that none of the offered positions are suitable as available alternative employment positions for Claimant given his physical and pre-existing mental conditions. As aforementioned, Employer bears the burden of establishing the existence of realistically available job opportunities within the geographic area in which Claimant resides and which he is capable of performing considering his age, education, work experience and physical restrictions, and which he "could realistically secure if he diligently tried." *Hansen v. Container Stevedoring Co.*, 13 BRBS 155, 159 n.5 (1997).

With respect to the five remaining positions, Claimant testified that he cannot do the work he used to do because he does not have the stamina. TR at 172. Claimant also testified that he has looked for jobs since the February 2000 incident and has telephoned fast food places in Seattle, Bainbridge Island, and Kitsap County asking for entry-level positions explaining to them his medical limitations and never denying that he had a prison record. TR at 155-56. He further testified that after explaining his medical limitations to these potential employers, they told him that they could not use him. TR at 156. Claimant also testified that when he met with Ms. Cohen, he told her about his felony convictions, use of Paxil, and his anger problem. TR at 158. Dr. Brodtkin also testified that Claimant has an anger problem and takes Paxil for depression and, occasionally, Trazedone to help him sleep. TR at 68. Claimant also testified that he has been continuously taking Paxil every day for 2.5-3 years through trial. TR at 197.

Claimant further denies that he is able to perform any of the five remaining positions on the basis of his lack of stamina, inability to work around irritating chemicals, dust, or fumes, and due to his history of isolated work assignments away from the public or "crew" positions. Claimant's failed work attempts after the February 16, 2000 incident with Labor Ready and the Millionaire's Club support his argument. Moreover, I rely on treating physician Dr. Brodtkin's similar opinion that none of the positions proffered by Employer are suitable for Claimant given his physical and pre-existing mental conditions. TR at 79-95.

For example, Dr. Brodtkin testified that he reviews all medical records in a case before determining whether a patient is able to perform job activities within medical restrictions. TR at 94-95. Dr. Brodtkin also discussed his methodology in determining whether a specific vocational job is appropriate for an individual by looking for job activities that can reasonably be performed by an individual looking into the physical demands of the job. *Id.* Dr. Brodtkin frequently is asked to sign off as to appropriate jobs for patients with restrictions but in this case he never received any job descriptions from Ms. Cohen. TR at 41-44.

Dr. Brodtkin found each one of Ms. Cohen's vocational jobs for Claimant problematic and he opined that he would not sign off or approve any of the jobs because they involved public contact or irritating fumes (assembler soldering). TR at 79-95. In addition, entry-level fast food jobs are inappropriate because they involve irritating fumes from grills, cleaning products or food handling which is inappropriate with Claimant's persistent phlegmy cough, and also due to Claimant's limited stamina since he cannot walk more than two level blocks without losing his breath. *Id.* In addition, Dr. Brodtkin after reviewing reports of Dr. Hamm and Dr. Niems, and Ms. Cohen both believe that Claimant is suitable for jobs that require minimal public contact. TR at 95; CX 2 at 320-21; EX 3 at 3.48-3.50; EX 5 at 5.67.

In addition, Ms. Cohen did not consider Dr. Niems's restriction for Claimant against employment due to his psychiatric condition as of February 8, 2002⁷. TR at 232-34. Finally, the dietary aide and fast food cook, kitchen worker, and crew member positions require frequent standing and walking, food handling, and good people or customer service skills – all of which do not fit within Claimant's restrictions. EX 11 at 11.272.

In reviewing all the evidence, I find that Claimant is incapable of working any of the positions listed in Employer's two labor market surveys. I further find that Employer has not met its burden of establishing the existence of suitable alternate employment on February 16, 2000.

Compensation

The parties have stipulated and I have found substantial evidence in support that Claimant's compensation rate at the time of injury was at the statutory minimum rate of \$225.32 per week and not less than fifty percent of the national average weekly wage at the time. Stip. Fact No. 5; EX 4 at 4.51-4.63.

For total disability, whether temporary or permanent, Claimant is entitled to compensation at the rate not less than 50% of the applicable national average weekly wage. 33 U.S.C. § 906(b)(2) and 8(a)-(b). Claimant is therefore entitled to temporary total disability of \$225.32 per week from February 17, 2000 through September 30, 2000; \$233.46 per week from October 1, 2000 through April 17, 2001, when Claimant reached maximum medical improvement for his respiratory condition.

Claimant is also entitled to permanent total disability of \$233.46 per week from April 18, 2001 through September 30, 2001, \$241.52 per week from October 1, 2001 through September 30, 2002, \$249.14 per week from October 1, 2002 through September 30, 2003, \$257.70 per week from October 1, 2003 through September 30, 2004, and \$261.79 per week from October 1, 2004 and continuing as adjusted for future increases.

With respect to Claimant post-traumatic stress syndrome and aggravated depression, Claimant is also entitled to temporary total disability of \$225.32 per week from February 17, 2000 through September 30, 2000 and \$233.46 per week from October 1, 2000 through April 20, 2001, when Claimant's aggravated depression resolved.

⁷ Dr. Neims diagnosed Claimant as having a Major Depressive Episode, marked without psychotic features, an impulse control disorder NOS (provisional), and alcohol dependence in reported continuous remission, and cannabis abuse, in reported remission as to Axis I. CX 2 at 318. Dr. Neims also found Claimant as having an Axis II personality disorder NOS (antisocial and paranoid traits), primary diagnosis. *Id.* Dr. Neims concluded by stating that Claimant was an appropriate candidate for Social Security Disability assessment. CX 2 at 321. He further stated that Claimant's characterological and mood related problems in combination with physical issues would leave it very difficult for Claimant to re-obtain sustained gainful employment. *Id.*

Entitlement to Medical Expenses

Section 7(a) of the Act provides in relevant part that the “Employer shall furnish medical, surgical, and other attendance or treatment [...] for such period as the nature of the injury or the process of recovery may require.” 33 O.K. § 907(a). In order for medical expenses to be assessed against an employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Reasonable and necessary medical expenses are those related to and appropriate for the diagnosis and treatment of the industrial injury. 20 C.F.R. § 702.402; *Pardee v. Army & Air Force Exchange Serv.*, 13 BRBS 1130, 1138 (1981). A claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). Claimant carries the burden to establish the necessity of such treatment rendered for his work-related injury. *See generally Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Wheeler v. Interocean Stevedoring Inc.*, 21 BRBS 33 (1988).

As I find that there was no intervening cause and medical benefits are never time barred, Employer is responsible for all reasonable and necessary medical expenses stemming from the work-related respiratory injury.

Claimant contends that Employer is responsible for Claimant’s past and future medical expenses with Drs. Brodtkin and Horne. Claimant’s earlier 8(i) settlement paid his medical expenses for his respiratory condition through the date of settlement approval, April 30, 2001, EX 1 at 1.10, 1.14-17. Dr. Brodtkin examined Claimant on September 13, 2004 and found Claimant to have continuing ongoing respiratory symptoms consistent with ongoing airway reactivity, asthma, and wheezing. TR at 63. Dr. Brodtkin opined that Claimant needs maintenance therapy for his asthma involving a combination of long-acting bronchodilators to open the airways up and an inhaled steroid to minimize inflammation and then rescue therapy for when bronchospasm or closure of the airways occurs. TR at 63-64. Dr. Brodtkin further opined that in addition to these medications, the medications need management by a physician who is experienced or comfortable in treating respiratory illnesses. TR at 64.

I find that Claimant is entitled to reasonable medical expenses incurred with respect to his respiratory condition from May 1, 2001 to present and continuing. This includes yearly physicals and medications for Claimant’s respiratory condition including long-acting bronchodilators and an inhaled steroid and all reasonable psychiatric medical expenses from February 17, 2000 through April 20, 2001. Employer states that if I find it liable for Claimant’s medical expenses, it stipulates that \$20,602.63 is due and owing the specific providers. ALJX 10 at 16-17; CX 7 at 593-99.

Employer’s Entitlement To \$10,000 Offset

The parties have stipulated that Employer is entitled to credit for the \$10,000 paid to Claimant by Labor Ready in settlement of its case. See EX 1 at 1.10-1.18.

ORDER

Based on the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that:

1. Employer shall pay Claimant temporary total disability compensation of \$225.32 per week from February 17, 2000 through September 30, 2000; \$233.46 per week from October 1, 2000 through April 17, 2001, when Claimant reached maximum medical improvement for his respiratory condition.
2. Employer shall pay Claimant permanent total disability of \$233.46 per week from April 18, 2001 through September 30, 2001, \$241.52 per week from October 1, 2001 through September 30, 2002, \$249.14 per week from October 1, 2002 through September 30, 2003, \$257.70 per week from October 1, 2003 through September 30, 2004, and \$261.79 per week from October 1, 2004 and continuing as adjusted for future increases.
3. Employer shall also pay Claimant temporary total disability of \$225.32 per week from February 17, 2000 through September 30, 2000 and \$233.46 per week from October 1, 2000 through April 20, 2001, when Claimant's aggravated depression resolved.
4. Employer shall pay Claimant or the medical provider, if unpaid, his reasonable medical expenses incurred with respect to his respiratory condition from May 1, 2001 to present and continuing including yearly physicals and medications for Claimant's respiratory condition including long-acting bronchodilators and an inhaled steroid and all reasonable psychiatric medical expenses from February 17, 2000 through April 20, 2001.
5. Employer is entitled to a credit of \$10,000 for the settlement proceeds that Claimant received from Labor Ready.
6. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the OWCP shall be paid on all accrued benefits computed from the date each payment was originally due to be paid.
7. The District Director shall make all calculations necessary to carry out this Order, including adjustments to the statutory minimum compensation rate payable to Claimant from February 17, 2000 and continuing; and
8. Counsel for Claimant shall within 20 days after service of this Order submit a fully supported application for costs and fees to counsel for Employer and to the undersigned Administrative Law Judge. Within 20 days thereafter, counsel for Employer shall provide Claimant's counsel and the undersigned Administrative Law Judge with a written list specifically describing each and every objection to the proposed fees and costs. Within 20 days after receipt of such objections, Claimant's counsel shall verbally discuss each of the objections with counsel for Employer. If the two counsel disagree on any of the proposed fees or costs, Claimant's

counsel shall within 15 days file a fully documented petition listing those fees and costs which are still in dispute and set forth a statement of Claimant's position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for Employer. Counsel for Employer shall have 15 days from the date of service of such application in which to respond. No reply will be permitted unless specifically authorized in advance.

IT IS SO ORDERED.

A

Gerald Michael Etchingham
Administrative Law Judge

San Francisco, California